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No. 5735

United States
Circuit Court of Appeals
For the Ninth Circuit.

YEE MON,

Appellant,

vs.

LUTHER WEEDIN, United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

FILED

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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No. 5735

United States
Circuit Court of Appeals
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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL OF RECORD.

HUGH C. TODD, Esquire, Attorney for Appellant,
323 Lyon Building,
Seattle, Washington.

ANTHONY SAVAGE, Esquire, Attorney for Appellee, 310 Federal Building,
Seattle, Washington.

TOM DeWOLFE, Esquire, Attorney for Appellee,
310 Federal Building,
Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 12,712.

In the Matter of the Petition of YEE MON for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

Comes now Yee Mon, and petitions this court for an order to show cause and the issuance of a writ of habeas corpus against the Hon. Luther Weedin, Commissioner of Immigration at the Port of Seattle, and shows to the court as follows:

*Page-number appearing at the foot of page of original certified Transcript of Record.

I.

That your petitioner is the blood son of Yee Ngoey, a native-born citizen of the United States.

II.

That your petitioner is not being held under or by virtue of any judgment, decree, final order or process issued by a court or a Judge of the United States, in a case where such courts or Judges have exclusive jurisdiction under the laws of the United States, or have acquired exclusive jurisdiction by commencement of legal proceedings in such a court, nor by virtue of the final judgment or decree of a court or competent tribunal of civil or criminal jurisdiction or the final order of such a tribunal made in the special proceedings instituted for any cause except to punish him for contempt; or by virtue of an execution or other process issued upon such a judgment, decree or final order; or by virtue of a warrant issued from any court upon an indictment or information. [2]

III.

That your petitioner is under an order of deportation by the Department of Labor, detained by the Commissioner of Immigration at Seattle, and that the cause or pretense upon which said order of deportation of your petitioner is based is that the Commissioner of Immigration held that your petitioner is not the son of Yee Ngoey, as aforesaid, from which order an appeal was taken to the Secretary of Labor, and said appeal was dismissed.

IV.

That the record made in the hearings of your petitioner's case before the immigration service shows that the American citizenship of Yee Ngoey, the father of your petitioner, is conceded by the Department of Labor, who now resides in the United States, and the record further shows that your petitioner Yee Mon is the blood son of the said Yee Ngoey, and therefore a citizen of the United States and entitled to be admitted and that there is no evidence to the contrary; that said order of deportation is based upon suspicion and conjecture, and not upon any evidence, and therefore the immigration officials have abused their discretion and your petitioner has not had a fair trial.

WHEREFORE, your petitioner prays that an order to show cause be issued by this court, ordering and directing said Commissioner of Immigration to appear and show cause in said court on the 12th day of November, 1928, at 10:00 o'clock A. M. why said writ should not be granted, and your petitioner further prays that a writ of habeas corpus may thereafter be issued directed against said Commissioner of Immigration, commanding him to have your petitioner before the undersigned Judge of the United States District Court for the Western District of [3] Washington, Northern Division, at the Federal Building, Seattle, Washington, at such time as may be by said court hereafter named, to do and receive what shall then and there be con-

sidered concerning your petitioner, together with the time and cause of his detention.

余文,

Petitioner.

HUGH C. TODD,

Attorney for Petitioner.

State of Washington,
County of King,—ss.

Yee Mon, being first duly sworn, on oath, through a sworn interpreter, says; that he is the petitioner above named; that he has read the foregoing petition, knows the contents thereof, and believes the same to be true.

余文

Petitioner.

ONG JEONG POY,

Interpreter.

Subscribed and sworn to before me this 19th day of October, 1928.

[Seal] W. D. LAMBUTH,

Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Oct. 19, 1928. [4]

In the United States District Court for the Western District of Washington, Northern Division.

No. 12,712.

In the Matter of the Application of YEE MON for a Writ of Habeas Corpus.

DECISION.

January 7, 1929.

HUGH C. TODD, Attorney for Petitioner; ANTHONY SAVAGE, U. S. Dist. Atty., PAUL D. COLES, Asst. U. S. Dist. Atty., Attorneys for Government.

NETERER, District Judge.—The writ is denied.

NETERER,
U. S. District Judge. [5]

[Title of Court and Cause.]

ORDER DENYING WRIT.

The above-entitled matter having come on for hearing before the undersigned District Judge, upon the petition and record herein, the Court having heretofore rendered its written decision denying the petition for a writ of habeas corpus, and the Court being fully advised in the premises, it is hereby

ORDERED and DECREED that the writ of habeas corpus as prayed for herein, be and the same is hereby denied on the ground that the record does

not prove that the petitioner herein is the son of Yee Ngoey, a citizen of the United States.

It is hereby further ordered that the petitioner herein shall have five days within which to file notice of appeal.

Done in open court this 11th day of January, 1929.

JEREMIAH NETERER,
United States District Judge.

Service accepted Jan. 11, 1929.

HUGH C. TODD,
Attorney for Petitioner.

Filed Jan. 11, 1929. [6]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To LUTHER WEEDIN, United States Commissioner of Immigration at the Port of Seattle, and to ANTHONY SAVAGE, His Attorney:

You, and each of you, are hereby notified that Yee Mon, appellant above named, hereby and now appeals from that certain order, judgment and decree made herein by the above-entitled court on the 11th day of January, 1929, adjudging, holding, finding and decreeing that the above-named petitioner be denied a writ of habeas corpus, and from

the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

HUGH C. TODD,
Attorney for Appellant.

Copy received January 15, 1929.

ANTHONY SAVAGE,
U. S. Dist. Atty.

[Endorsed]: Filed Jan. 15, 1929. [7]

[Title of Court and Cause.]

PETITION FOR APPEAL.

Yee Mon, the appellant above named, deeming himself aggrieved by the order and judgment entered herein on the 11th day of January, 1929, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript of the record of the proceedings and papers, together with the immigration record in this case, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

HUGH C. TODD,
Attorney for Appellant.

Received a copy of the within petition for appeal this 15 day of Jan., 1929.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Jan. 15, 1929. [8]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding and decising that the petitioner herein is not the son of Yee Ngoey, a citizen of the United States.

II.

The Court erred in holding and decising that a writ of habeas corpus should be denied to the petitioner herein, denying him admission to the United States as a citizen.

HUGH C. TODD,
Attorney for Appellant.

Copy recd. Jan. ——, 1929.

————————————.

Received a copy of the within assignment of errors this 15 day of Jan.,1929.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1929. [9]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Now, to wit, on this 15th day of January, 1929, it is ordered that the appeal herein be allowed as prayed for; and it is further ordered that the Commissioner of Immigration at the port of Seattle

shall retain custody of said appellant pending appeal and the further orders of this court and the orders of the United States Circuit Court of Appeals for the Ninth Circuit, the petitioner herein being required to pay his maintenance at the United States Immigration Station while so detained.

Done in open court this 15th day of January, 1929.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within order this 15 day of Jan., 1929.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1929. [10]

[Title of Court and Cause.]

STIPULATION RE TRANSMISSION OF ORIGINAL RECORD AND FILE OF DEPARTMENT OF LABOR.

IT IS HEREBY STIPULATED AND AGREED by and between Hugh C. Todd, Esquire, attorney for petitioner above named, and Anthony Savage, Esquire, attorney for respondent, Luther Weedin, United States Commissioner of Immigration, that the original file and record of the Department of Labor covering the proceedings against the petitioner above named, may be by the Clerk of this court sent up to the Clerk of the Circuit

Court of Appeals, as a part of the appellate record, in order that the said original immigration file may be considered by the Circuit Court of Appeals, in lieu of a certified copy of said record and file, and that said original records may be transmitted as part of the appellate record.

HUGH C. TODD,
Attorney for Petitioner.
ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Asst. U. S. Attorney.

[Endorsed]: Filed Jan. 15, 1929. [11]

[Title of Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL RECORD OF DEPARTMENT OF LABOR.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby ORDER, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner directly to the Clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record, but not to relieve from the rule to print, unless the C. C. A. so directs.

Done this 15 day of January, 1929.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within order this 15 day of Jan., 1929.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1929. [12]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled case for appeal of the said appellant, heretofore allowed to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Decision.
3. Judgment.
4. Petition for appeal.
5. Notice of appeal.
6. Order allowing appeal.
7. Assignment of errors.
8. Citation.
9. Stipulation.

10. Order for transmission of original record.
11. This praecipe.

HUGH C. TODD,
Attorney for Appellant.

Received a copy of the within praecipe this 15 day of Jan., 1929.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1929. [13]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 13, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [14]

Clerk's Fees, Act Feb. 11, 1925, for making record, certificate or return, 18 folios at 15¢	$2.70
Certificate of Clerk to Transcript of Record, with seal	.50
Certificate of Clerk to Original Exhibits, with seal	.50
Total	$3.70

I hereby certify that the above cost for preparing and certifying record, amounting to $3.70, has been paid to me by the attorney for appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 21st day of February, 1929.

[Seal] ED. M. LAKIN,

Clerk United States District Court, Western District of Washington.

By S. E. Leitch,

Deputy. [15]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

To Honorable LUTHER WEEDIN, United States Commissioner of Immigration at the Port of Seattle, GREETING:

Whereas, Yee Mon has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and decree lately, to wit, on the 11th day of January, 1929, rendered in the District Court of the United States for the Western District of Washington, Northern Division, made in favor of you, adjudging and decreeing that the writ of habeas corpus as prayed for in the petition herein be denied.

You are therefore cited to appear before the United States Circuit Court of Appeals for the Ninth Circuit, in the city of San Francisco, State of California, within the time fixed by statute, to do and receive what may obtain to justice to be done in the premises.

Given under my hand in the city of Seattle, in the Ninth Circuit, this 15th day of January, in the year of our Lord one thousand nine hundred and twenty-nine and the Independence of the United States the One Hundred and Fifty-third.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received a copy of the within citation this 15 day of Jan., 1929.

ANTHONY SAVAGE,
Attorney for Respondent.

[Endorsed]: Filed Jan. 15, 1929. [16]

[Endorsed]: No. 5735. United States Circuit Court of Appeals for the Ninth Circuit. Yee Mon, Appellant, vs. Luther Weedin, United States Commissioner of Immigration at the Port of Seattle, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed February 25, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States
Circuit Court of Appeals
For the Ninth Circuit

No. 5735

YEE MON,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration, at the Port of Seattle, Washington.

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Hon. JEREMIAH NETERER, *Judge*

Brief of Appellant

HUGH C. TODD,
Attorney for Appellant.

Office and Post Office Address:
323-325 Lyon Building, Seattle, Wash.

MARTIN & DICKSON, PRINTERS

FILED

MAY 1 [illegible]

In the United States Circuit Court of Appeals For the Ninth Circuit

No. 5735

YEE MON,

Appellant,

vs.

LUTHER WEEDIN, as Commissioner of Immigration, at the Port of Seattle, Washington.

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
Hon. JEREMIAH NETERER, *Judge*

Brief of Appellant

STATEMENT OF THE CASE

The petitioner is applying for admission into the United States as the son of a native-born (Chinese) citizen of the United States. The immigration authorities concede that the petitioner's father, Yee Ngoey, is a citizen of the United States, and therefore the sole question in this case is whether or not the record proves the relationship of father and son between Yee Ngoey and Yee Mon (Moon).

ARGUMENT

PROOF OF RELATIONSHIP

As stated above, the citizenship of the father is conceded, and he has made several trips to China and was re-admitted to the United States on each occasion as a citizen. He was in China at a time to make possible the paternity in this case, for in record No. 1430-10/11, on June 1, 1915, on board the S. S. Magnolia, just before he was landed, the father is recorded in the immigration record as stating that he had a son in China named Yee Moon, *two years of age* (Chinese calendar). The present applicant was born in 1914, and when he applied for admission at the Port of Seattle he was only *fourteen years old.* In the same record, on November 12, 1919, the father again testified that he had a son in China named Yee Moon, *six* years old.

In record No. 2500-2442, on board the S. S. Prince Arthur, July 13, 1922, the father again identified this petitioner as Yee Moon, aged *nine* years.

In record No. 11249-88, on page 3, in December, 1916, the father again identified the petitioner as his third son, Yee Moon, *three* years old.

In record No. 8866-9/18, on October 2, 1924, the father again identified this petitioner as his third son, named Yee Moon.

In record No. 2500-5147, in the year 1922, the father again identified the present applicant as his son.

Therefore, on six different examinations, in addition to the present applicant's examination in 1928, the father, in 1915, when the boy was two years old, Chinese calendar; in the year 1916, in the year 1919 and twice in the year 1924, identified the present petitioner as his son.

In the year 1922, the petitioner's father brought to the United States two older brothers of the present petitioner, and they were landed at Boston, according to record 2500-5147. The two prior-landed brothers, in 1922, stated that they had a brother in China named Yee Moon, and in the instant record said two prior-landed brothers, who are now residing with their father in Cleveland, Ohio, were examined this year in Cleveland, and not only corroborated their testimony of 1922, but identified the present applicant as their brother.

In order to corroborate this identification of the petitioner's father and his prior-landed brothers, the present petitioner in turn identifies the photographs of his father and the photograph of Yee Sang and Yee Toy, the two prior-landed brothers. Your Honors will note a strong family resemblance in the photographs of

all of these four Chinese, and particularly between the photographs of the father and the present petitioner.

In addition to the previous hearings in which the father has identified his son, the present petitioner, as well as the two prior-landed brothers, there are many intimate answers to questions in this hearing which convinces one that this record proves the claimed relationship. For instance, on page 8 of petitioners testimony and on page 20 of the fathers testimony, in the present record, we find them both testifying that chickens are kept by their family, but that they do not keep pigs. On page 6 of the petitioner's testimony, and on page 17 of the father's, they both testify that their house is a regular five-room house with two kitchens, and that one kitchen is used for cooking and storage and that the other kitchen is unused. On page 2 of the petitioner's testimony, and on page 13 of the father's testimony, we find that they both testify that the appellant has a deceased brother named Yee Ga, and they both give the name of the physician who attended him when he was ill. On page 6 of the petitioner's testimony and on page 18 of the father's testimony, we find that they both testify that they have a rice pounder and rice mill in the sitting room of their home; and in addition thereto the father and the petitioner corroborate one another in practically every particular in

their extended examinations, and their testimony is corroborated on important matters of relationship by the testimony of the two prior-landed brothers.

SO-CALLED DISCREPANCIES

The discrepancies in this case are few, slight and immaterial and do not place the slightest doubt on this well established case of relationship. For instance, only four of these so-called discrepancies are urged, as follows:

(1) It will also be noted that the present applicant was born in 1914, and that his two prior-landed brothers left their home in China for the United States in 1922, when the present applicant was but eight years of age, and *some of the discrepancies charged against the present petitioner date back to the time when this petitioner was but eight years old.* For instance, the two prior-landed brothers were born in Seung Wong Village, and moved to the Wai Lung Lee Village in 1913. Petitioner, fourteen, said something when he was first examined about not having seen his prior-landed brothers, but later testified positively that he had seen them, but as he has not seen them since he was 8 years of age, it might almost to his childish mind appear as though he had never seen them, although he did later testify that he had seen his brothers and identified their photographs. (2) In July, 1922, the father re-

turned from a visit to China, and was followed six months later by the two prior-landed brothers. The petitioner testifies that on that trip the father and two prior-landed brothers came to the United States together. The boy at that time was *only eight years old.* His mind could not be charged with that fact. Although it is not in the record, I asked the father if the petitioner knew whether they came together or not, and the father stated that they left home together, but that the two sons remained in Hong Kong from July until December, the delay being caused by the two prior-landed brothers not being able to secure passage on that boat, through some delay in their papers, and the record shows that the affidavit was made in the year 1920, and naturally the father intended to bring these two boys with him from China on the same boat in the year 1922, but the fact is that *they followed only six months later.* (3) There is no ancestral hall in their home village. The father testified that there is an ancestral hall near the village and the present applicant says there is no ancestral hall near the village. (4) One slight discrepancy mentioned is that the petitioner testified that Yee Jung, his fourteen year old brother, had attended school, and the father testifies that this boy had not attended school. Again I inquired of the father about this inconsistency, and he stated to me

that the petitioner testified correctly, that Yee Jung had attended school, and that if the record shows that he, the father had testified that Yee Jung had not attended school, that such an answer is incorrect, but that he meant a younger son, who is only seven years old, had not attended school as he was too young; so the court will readily see that such so-called discrepancies are not to be used to destroy the rights of citizenship. These are practically the only discrepancies in this whole proven case of relationship.

Some slight discrepancies exist naturally in every record, and some slight discrepancies exist in the leading case on "discrepancies," *Go Lun vs. Nagle,* 22 Fed. (2d) 246, but, likewise, no serious discrepancies exist in the instant case. Judge Rudkin, in the Go Lun case, said that the purpose of these immigration hearings is to inquire into the citizenship or relationship of the appellant, and not for the purpose of developing discrepancies which may support an order of exclusion, regardless of the fact that the question of relationship has been proven.

Now, then, in the instant case, the question of relationship has been proven without any question. The slight discrepancies or differences in testimony developed do not support an order of exclusion regardless of the proven case of relationship.

This case comes clearly within the rule of the decision of the United States Circuit Court of Appeals for the Ninth Circuit, in the case of *Go Lun vs. Nagle,* 22 Fed. (2d) 246, opinion written by Judge Rudkin. The opinion cites 13 Fed. (2d) 262; 16 Fed. (2d) 65; and 17 Fed. (2d) 11. The Court there said:

> "A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt, that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious, and without support in testimony."

After reviewing the discrepancies in the Go Lun case, supra, this court said:

> "In any event, false swearing and perjury cannot be predicated on a circumstance so trifling. * * *
>
> "The purpose of the hearing is to inquire into citizenship of the appellant, not to develop discrepancies which may support an order of exclusion regardless of the question of citizenship." (citizenship being based upon the question of relationship, the point at issue.)

In the Go Lun case the three main discrepancies, although there were others, refer to a difference in the testimony, (1) in regard to pavement in front of their house; (2) discrepancies in regard to the location of the father's rice land, the appellant stating that he did not know where it was located, although it was

within 500 feet of their house; and (3) discrepancies between the testimony of the witnesses in regard to the windows and skylights in the school house. From a reading of the Go Lun case, supra, and a review of the record in the instant case, it is apparent that the alleged discrepancies in the instant case are no more serious than those in the Go Lun case, where the Circuit Court of Appeals reversed the Department of Labor and the lower court, and directed the issuance of the writ.

Inconsistencies in the testimony of the alien and his witnesses on minor points on which there might be a difference of recollection does not overcome the effect of substantial favorable testimony.

The immigration service refuses to follow the Go Lun decision and the other cases cited, where the records are similar, and admit the present petitioner to the United States, notwithstanding the record proves conclusively that the relationship of father and son exists.

The Court in the Second District follows the ruling of the Ninth Circuit in defining the jurisdiction of courts to review the decisions of the Secretary of Labor in Chinese exclusion cases. The Circuit Court there states:

> "The rule is if it appeared that there was some evidence, and sufficient to satisfy a reasonable man, that the Chinese person claiming the rights of American citizenship was not entitled thereto, he must be excluded. But here the evidence does not warrant a reasonable mind holding that appellant was other than he represented. The result below does not satisfy the requirement of a fair hearing. There is no substantial evidence to support the conclusion below. There was no substantial evidence of contradiction on any material point, which would justify rejecting testimony which amply proves the claim of the appellant that he was the son of Leong Ding. The order is reversed and the writ sustained." 22 Fed. (2d) 926.

In conclusion, then, it must be said in the instant case that, inconsistencies in the testimony of the alien and his witnesses on minor points on which there might be a difference of recollection does not overcome the effect of substantial favorable testimony, and in the instant case this Court can well say as in the Go Lun case, supra:

> "A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt, that their relationship was fully established, and that the appellant is a citizen of the United States."

It is therefore submitted that the writ should be granted in this case.

Respectfully submitted,

HUGH C. TODD,
Attorney for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5735

YEE MON,

Appellant

vs.

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Brief of Appellee

ANTHONY SAVAGE,
United States Attorney,

PAUL D. COLES,
Assistant United States Attorney,

TOM DeWOLFE,
Assistant United States Attorney,
Attorneys for Appellee.

JOHN F. DUNTON,
United States Immigration Service,
Seattle, Washington,
On the Brief.

P. O. Address: 310 Federal Building
Seattle, Washington

FILED
JUN 10 1929

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5735

YEE MON,

Appellant

vs.

LUTHER WEEDIN, as United States Commissioner of Immigration at the Port of Seattle, Washington,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, *Judge*

Brief of Appellee

STATEMENT OF THE CASE

The appellant, YEE MON (or MOON), is of the Chinese race and claims to have been borne in China on a Chinese date equivalent to August 27, 1914. He never resided in the United States. He arrived at the

Port of Seattle, Washington, May 7, 1928, on the S.S. "President Pierce," and applied for admission into the United States as the son of YEE NGOEY, a native born citizen of this country. After the usual hearings, he was refused admision by a Board of Special Inquiry at the Seattle, Washington, Immigration Office. Thereafter he appealed from the decision of the Board of Special Inquiry to the Secretary of Labor, his appeal was dismissed by the Secretary of Labor and his return to China directed. Subsequently he filed a petition for a writ of Habeas Corpus in the United States District Court for the Western District of Washington, Northern Division. The case now comes before this Court on appeal from the decision of the District Court denying the Writ.

ARGUMENT

The nativity of the alleged father, YEE NGOEY was conceded by the Immigration Officials. The appellant was refused admission by the Board of Special Inquiry for the reason that it did not satisfactorily appear that he (appellant) was the son of his alleged father, YEE NGOEY, nor that he (appellant) was a citizen of the United States, nor that he had any right to admission under the Chinese Exclusion Law; and

for the further reason that he was an alien ineligible to citizenship inadmissible under Section 13 (c) of the Immigration Act of 1924. Were the relationship as claimed, the appellant would be entitled to recognition as a citizen of the United States under Section 1993 R. S. (8 USCA Sec. 6), and neither the Chinese Exclusion Laws nor the Immigration Act of 1924 would have any force or effect. Consequently the claimed relationship is the only question at issue.

Section 23 of the Immigration Act of 1924 (43 Stat. L. Ch. 190, p. 153) places the burden of proof upon appellants for admission into the United States, and this doctrine has been uniformly upheld by the Courts.

Rule 10, subdivision 3, of the Chinese Rules of the Department of Labor of Oct. 1, 1926 provides as follows:

> "In every application for entry as the child of a citizen there shall be exacted *convincing proof* of relationship asserted as the basis for admission *******" (italics ours)

While it is true, as stated by counsel in his Brief that YEE NGOEY has claimed a son of the name and approximate age of the appellant on various occasions,

and that such claim has also been supported by statements of two alleged brothers of appellant, there are certain discrepancies in the testimony which plainly indicate that the claimed relationship does not exist.

> The appellant states that SEUNG WAN Village, where his older brothers were born, is about 1 or 2 lis *East* of his Village (approximately 5 to 10 city blocks), while the alleged father states that this Village is a little over 1 poo (over three miles) *West* of his Village.
>
> The appellant states that his father is the owner of a piece of rice land, while the alleged father claims that he owns no rice land and never did own any.
>
> The appellant states that there is no ancestral hall near his village, while the alleged father claims that the SIN DEUNG ancestral hall is located only about ½ li (2 to 3 city blocks) West of his village.
>
> The alleged father states that about 2 years ago, a new house was built by JU LUNG in the 4th or 5th row of their village, the location of said house being in the next row to that in which the alleged father and appellant claim to have lived. The appellant has no knowledge regarding the erection of this house, and states that he has no recollection of any new residences or other buildings ever having been built in his village. Later, however, he stated that a man named YUK KUI had built a house several years ago. The appellant states that this YUK KUI's house is opposite the small door of his house, and that YUK KUI's

other name is LAI GUI. The alleged father states that this man's other name is TUNG GUN.

The appellant at first testified that he had never seen either of his elder brothers, for the reason that, before coming to the United States, they had lived in the SEUNG WAN Village, where thev were born, while he himself was born in WAI LUNG LEE Village and had always lived there. He further stated that the said brothers had never lived in the WAI LUNG LEE Village, and that he himself had never been in the SEUNG WAN Village; also that he did not know whether or not these brothers ever attended school. This testimony was given *in the forenoon.* When his examination was resumed *after the noon recess,* the appellant made the statement that his brother. YEE SANG would testify in his behalf, and claimed that his previous testimony regarding his brothers, YEE SANG and YEE TOY was a mistake; that he had thought the matter over and then remembered that he had seen these two brothers and that both had slept in the same house with him in the WAI LUNG LEE Village. He also claimed to remember that they had slept in the large doorside of his house, which was the taller of the two brothers, what time in the day they had started from the home village with their father for this country, and that their destination was Cleveland at that time. The appellant also stated that his brother, YEE JUNG, had attended school from the time he was 9 until he was 14, and that he and YEE JUNG had attended school together. The alleged father testified that YEE JUNG had never attended school for the reason that he was too young.

The knowledge which appellant showed after the noon recess, contrasted with his ignorance prior to said recess is manifestly explainable only on the hypothesis that, during said recess, he must have studied some "coaching paper" which was in his possession, and the contents of which he had forgotten when testifying in the forenoon. This phase of the case is somewhat similar to that of *Moy Chee Chong V. Weedin* 28 F (2d) 263, decided by this Court September 4, 1928. In that case the record of the applicant's testimony had been forwarded to Minneapolis for statements by his alleged father and brother and, after said testimony had been returned to Seattle, the applicant, who had previously testified that his grandmother was living, came to the conclusion that she had been dead for several years. In his opinion, Circuit Judge Gilbert said:

> "******it is fairly inferable that in the meantime he had received news from Minneapolis advising him of the statements made by his alleged father and brother ******"

and did not accord the applicant any credit for changing his testimony to agree with that of his alleged father and brother.

On his return from China the alleged father stated at San Francisco, June 1 1915, that he had three sons. and that his third son, who is claimed to be the appellant, was born CR 3-9-2 (Oct. 20, 1914). Again at Chicago Nov. 12, 1919, he gave the same date for the birth of his third son. It was not until he testified at Boston December 28, 1922, that he gave the date C. R. 3-7-7 (August 27, 1914), which is now claimed to be the correct date of appellant's birth. This would appear to indicate that the date now given is simply one arbitrarily agreed upon between the alleged father and his alleged sons, the alleged father apparently having forgotten the date which he had given on the first two occasions on which he testified. If the alleged father had any such son as the appellant, there appears to be no conceivable reason why he should not have known the date of his birth when he returned from China in 1915, and when the said son was less than one year old.

Various other discrepancies and inconsistencies are commented on in detail in the memorandum of the chairman of the Board of Special Inquiry (pp 59-53 of the record), and the memorandum of the Board of Review dated October 4, 1928, which it is not thought necessary to review further here. It seems sufficient to state, as will readily be apparent by reference there-

to, that they, together with the statements referred to above, constitute a basis upon which the immigration officials could reasonably have reached the conclusion at which they arrived. The opinion in *Go Lun V. Nagle*, cited by counsel, has no application.

The burden was on the appellant to prove the claimed relationship, and not on the Government to disprove it.

> *Christy v. Leong Don* (CCA 5), 5 F (2d) 135; certiorari denied, *Leong Don v. Chirsty*, 289 U. S. 560, and numerous other authorities.

Section 17 of the Immigration Act of February 5, 1917 (39 Stat. 887, 8 USC 153) provides for the establishment of Boards of Special Inquiry, defines the authority and duties of such Boards, and further provides that:

> "* * * In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, *the decision of a Board of Special Inquiry adverse to the admission of such alien shall be final unless reversed on appeal to the Secretary of Labor.* * * *" (Italics ours)

In the case of *Chin Share Nging v. Nagle*, 27 F. (2d), 848. this Court said:

"* * * * The conclusions of administrative officers upon issues of fact are invulnerable in the

Courts, unless it can be said that they could not reasonably have been reached by a fair-minded man, and hence are arbitrary.* * "

In the case of *Zakonaite v. Wolf*, 226 U. S. 272 33 Sup. Ct. 31, 57 L. Ed. 218, the rule was applied that, if it appears that there was some evidence, and sufficient to satisfy a reasonable man, that the Chinese person claiming the rights of American citizenship was not entitled thereto, he must be excluded.

On collateral review of deportation proceedings in habeas corpus, it is sufficient if some evidence supported the order, in the absence of flagrant error.

United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103.

Unless it affirmatively appears that the executive officers have acted in some unlawful or improper way and abused their discretion, their finding upon a question of fact must be regarded as conclusive, and is not subject to review by the courts.

U. S. ex rel. Leong Ding v. Brough (CCA 2), 22 F (2d) 926.

United States v. Ju Toy, 198 U. S. 253, 49 L. Ed. 1040.

Chin Yow v. United States, 208 U. S. 8, 52 L. Ed 369.

Low Wah Suey v. Backus, 225 U. S. 460.

The finality of the decisions of immigration officials in exclusion cases, *on questions of fact*, has also been upheld by the Supreme Court of the United States in the following cases:

Nishimura Ekiu v. United States, 142 U. S. 651.

Lem Moon Sing v. United States, 158 U. S. 538.

Lee Lung v. Patterson, 186 U. S. 168.

Tang Tun v. Edsell, 223 U. S. 673.

Tulsidas v. Insular Collector, 262 U. S. 258.

Quon Quon Poy v. Johnson, 273 U. S. 352.

See also:

United States v. Rogers, 65 F. 787.

Harlan v. McGourin, 218 U. S. 442, 54 L. Ed. 1101.

Cary v. Curtis, 3 How. 236, 11 L. Ed. 576.

No allegation has been made that the appellant was deprived of any right to which he was entitled in the course of his hearing before the immigration officials, or that the *conduct* of said hearing was in any respect other than fair and regular. Inasmuch as the question involved - *relationship - is purely a question of fact,* the decision of the said officials is final.

CONCLUSION

The appellant was accorded a fair hearing by the immigration officials, and failed to sustain the burden which was upon him to establish his claims. The evidence did not constitute convincing proof that the appellant was the son of his alleged father, and was not of such a nature as to require, as a matter of law, a favorable finding in that respect. The contradictory and inconsistent statements in the record constitute evidence upon which the immigration offiicials could reasonably arrive at their excluding decision. The said officials did not abuse the discretion committed to them by the statute, and their excluding decision was not arbitrary or capricious, or in contravention of any

rule of law. The District Court did not commit error in denying the Writ of Habeas Corpus, and its decision should be *affirmed.*

Respectfully submitted

ANTHONY SAVAGE,
United States Attorney,

PAUL D. COLES,
Assistant United States Attorney,

TOM DeWOLFE,
Assistant United States Attorney,

Attorneys for Appellee.

JOHN F. DUNTON,
United States Immigration Service,

Seattle, Washington,
On the Brief.

No. 5736

United States
Circuit Court of Appeals
For the Ninth Circuit.

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of LOUIS MORGAN, a Bankrupt,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

FILED
MAY

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Appellants:

A. J. HENNESSY, Esq., and GEORGE D. COLLINS, Jr., Esq., 506 Claus Spreckels Bldg., S. F., Cal.

For Appellee:

TORREGANO & STARK, Esqs., Mills Bldg., San Francisco, Calif.

District Court of the United States, Northern District of California, Northern Division.

CLERK'S OFFICE.—No. 17,170.

In re LOUIS MORGAN, in Bankruptcy.

To the Clerk of Said Court:

Sir: Please issue duly authenticated transcript of record on the appeal herein of Arvid Pearson and Alfred J. Hennessy, of the following, together with all endorsements thereon, viz:

1. Petition of A. W. Higgins, trustee in bankruptcy, filed with referee for order directing delivery of boat "Saxon."
2. Order to show cause of referee.
3. Plea to jurisdiction as filed with referee.
4. Certificate that no answer filed to plea to jurisdiction.

5. Order of referee directing delivery of boat.
6. Petition for review of order of referee.
7. Certificate that no answer filed by trustee in bankruptcy to petition for review.
8. Report of referee.
9. Order of District Court, submitting petition for decision.
10. Order and decree of District Court denying petition.
11. Appeal, assignment of errors, allowance of appeal and bond on appeal, also citation.

GEO. D. COLLINS, Jr.,
Attorney for Appellant,
506 Claus Spreckels Bldg., San Francisco.

[Endorsed]: Filed at 3 o'clock and 50 min., P. M., Mar. 11, 1929. [1*]

[Title of Court and Cause.]

PETITION FOR ORDER TO SHOW CAUSE.

To Hon. A. B. KREFT, Referee in Bankruptcy:

The petition of A. W. Higgins respectfully shows:

That he is the duly elected, appointed, qualified and acting trustee in bankruptcy of the estate of Louis Morgan, a bankrupt.

That on to wit: the 21st day of September, 1928, an action in claim and delivery was begun in the Superior Court of the State of California, in and for the city and county of San Francisco, entitled,

*Page-number appearing at the foot of page of original certified Transcript of Record.

Arvid Pearson, Plaintiff, vs. Louis Morgan, John Doe and Richard Roe, Defendants, and being numbered 199620 amongst the records and files of said Superior Court.

That at the time of filing the action, as aforesaid, the affidavit of Arvid Pearson, the plaintiff was filed, alleging amongst other things that he was entitled to the immediate possession of a certain boat named the "Saxon," and alleging that said boat was in the possession of Louis Morgan, one of the defendants in the action as aforesaid, and alleging further that the said Louis Morgan had held the possession of said boat from said Arvid Pearson wrongfully, and that the said Arvid Pearson was entitled to the delivery and immediate possession of said boat. [2]

That pursuant to the prayer of the action in claim and delivery and the affidavit of the plaintiff filed in said proceedings, the said boat "Saxon" was seized by the sheriff of the City and County of San Francisco and delivered over to the said Arvid Pearson, the plaintiff in said action, and ever since then said boat has been and is now in the possession of Arvid Pearson, his agents and/or attorneys.

That the petition in bankruptcy was filed by the said Louis Morgan on the 19th day of June, 1928, and the order of adjudication pursuant to said petition was duly made and filed on the 19th day of June, 1928, and said action in claim and delivery was filed in the Superior Court of the State of California on the 24th day of September, 1928;

That on the 19th day of June, 1928, the said boat "Saxon" was in the possession of said Louis Morgan, the bankrupt herein, as sole owner.

That upon the filing of the petition in bankruptcy as aforesaid, all of the property of the said Louis Morgan came into the custody of the United States District Court, and into the custody of Hon A. B. Kreft, as Referee in Bankruptcy to whom said proceedings were referred, and upon the election and qualification of your petitioner as Trustee herein he became entitled to the immediate possession of said boat "Saxon."

That it is necessary in the preservation of your petitioner's rights as Trustee herein and in the preservation of the rights of the general unsecured creditors herein, that the order to show cause hereinafter prayed for issue.

That Arvid Pearson, the plaintiff in said replevin action, is without the jurisdiction of this Court.

That A. J. Hennessy is the attorney in fact and the attorney at law representing the said Arvid Pearson. [3]

WHEREFORE, your petitioner prays that an order to show cause be issued by the above-entitled court directed to Arvid Pearson and A. J. Hennessy, to show cause, if any they have, why the said boat "Saxon" should not be immediately turned over and delivered to A. W. Higgins, as Trustee in Bankruptcy for Louis Morgan; and for such fur-

ther and other order as may be just and proper in the premises.

A. W. HIGGINS,
Petitioner.

ERNEST J. TORREGANO,
CHARLES M. STARK,
Attorneys for Petitioner.

Northern District of California,
City and County of San Francisco,—ss.

A. W. Higgins, being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that he has read same, and that the statements therein contained are true, according to the best of his knowledge, information and belief.

A. W. HIGGINS.

Subscribed and sworn to before me this 22d day of October, 1928.

[Seal] LOUIS WIENER,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 24, 1928. [4]

[Title of Court and Cause.]

ORDER TO SHOW CAUSE.

Upon the reading, filing and consideration of the verified petition of A. W. Higgins, trustee herein, praying for an order to show cause directed

to Arvid Pearson and A. J. Hennesy, to show cause, if any they have, why the boat "Saxon" described in the trustee's petition, should not be delivered over and possession thereof given to A. W. Higgins, Trustee in Bankruptcy in the above-entitled matter;

IT APPEARING to be a proper case for this order, and the Court being fully advised in the premises, and

IT IS ORDERED that Arvid Pearson and/or A. J. Hennesy show cause, if any they have, before me on the 27th day of October, 1928, at 10 o'clock A. M. why the said Arvid Pearson and/or A. J. Hennesy should not immediately turn over and deliver to the said A. W. Higgins, trutsee herein, the possession of the boat "Saxon."

IT IS FURTHER ORDERED that a copy of the trustee's petition and a copy of this order be delivered to Arvid Pearson and/or A. J. Hennesy at least two days before the return date of this order.

Done in open court this 24th day of October, 1928.

A. B. KREFT,
Referee in Bankruptcy.

[Endorsed]: Filed Oct. 24, 1928, at 3 o'clock and 20 min. P. M.

A. B. KREFT,
Referee in Bankruptcy. [5]

[Title of Court and Cause.]

PLEA TO THE JURISDICTION.

I.

Come now Arvid Pearson and A. J. Hennesy and specially appearing only for the purpose of interposing this plea to the jurisdiction of said United States District Court and to the jurisdiction of the Hon. A. B. Kreft, referee in bankruptcy herein, allege that said Court and Referee have no jurisdiction concerning the matters pleaded in the petition of A. W. Higgins "trustee," for an order to show cause directed to said Pearson and Hennessy, why the possession of the boat "Saxon" should not by them be turned over and delivered to said Higgins as trustee in bankruptcy for the estate of said Louis Morgan, and no jurisdiction over the person of said Pearson respecting said petition filed herein or respecting the order to show cause issued thereon by the said Hon. A. B. Kreft, referee in bankruptcy and dated the 24th day of October, 1928. And in support of said objections to the jurisdiction of said Court and to the jurisdiction of said Referee, the said Arvid Pearson and the said A. J. Hennessy aver as follows:

That prior to the alleged appointment of said A. W. Higgins as trustee in bankruptcy of the estate of said Louis Morgan, a bankrupt, there was commenced by said Arvid Pearson as plaintiff, an action in claim and delivery in the Superior Court of the State of California and in and for the [6]

city and county of San Francisco, against the said Morgan as defendant to recover the possession of said boat "Saxon." That said action is numbered 199,620 in said Superior Court. That the following is a true and correct copy of the complaint on file in said action, viz.:

In the Superior Court of the State of California in and for the City and County of San Francisco.

No. 199,620—Dept. ——

ARVID PEARSON,

Plaintiff,

vs.

LOUIS MORGAN, JOHN DOE and RICHARD ROE,

Defendants.

COMPLAINT IN ACTION TO RECOVER POSSESSION OF PERSONAL PROPERTY.

The plaintiff in the above-entitled action complains of the defendants therein and for cause of action alleges:

I.

That, heretofore, to wit: on the 19th day of August, 1927, the plaintiff and defendant Morgan entered into and executed a certain contract in writing whereby they became copartners in a certain boat then and there, and ever since and now situated in the said city and county of San Francisco, State of California. That said boat is of twenty-

one tons burden and designated the "Saxon" and is forty-two feet in length and twelve feet beam and of the value of one thousand and five hundred and no/100 dollars ($1,500.00). That said copartnership in said boat continued in existence until the said defendant Morgan, individually, was by the Southern Division of the United States District Court, in and for the Northern District of California, and by its order, judgment and decree, duly given and made on the 19th day of June, 1928, [7] and upon the voluntary petition filed in that court by said Morgan, adjudged a bankrupt. That said adjudication still remains in full force and effect and has never been vacated or set aside. That said bankruptcy proceedings are still pending in the said United States District Court. That plaintiff is not a party petitioner in said bankruptcy proceedings and has not been adjudged a bankrupt nor has said partnership been adjudged bankrupt nor is said partnership a petitioner in said proceedings in bankruptcy. That plaintiff does not consent to the said partnership property being administered in said bankruptcy, and claims the right to the possession of said property as said copartner and the right to settle the partnership business as provided in section five of the Bankruptcy Law of 1898.

II.

That the said boat is in the possession of defendants and they refuse to deliver the same to plaintiff. That plaintiff is entitled to the possession of said boat. That said defendants withhold and de-

tain the possession of said boat from plaintiff, against his will and without his consent. That said boat has not been taken for a tax, assessment or fine pursuant to a statute, nor seized under an execution or an attachment against the property of plaintiff.

III.

That plaintiff is ignorant of the names of defendants John Doe and Richard Roe and requests leave to insert herein their true names when discovered.

IV.

WHEREFORE, plaintiff prays judgment against said defendants for the possession of said boat or the sum of one thousand five hundred and no/100 dollars ($1,500.00), the [8] value thereof, in case delivery cannot be had and for costs of suit.

ALFRED J. HENNESSY,
Attorney for Plaintiff.

That in said action the plaintff therein furnished the sheriff of the said city and county of San Francisco at the time of issuance of the summons in said action and before answer served or filed in said action, the claim of plaintiff to the delivery of said boat "Saxon" to him the said plaintiff, by affidavit stating that the plaintiff is entitled to the possession of said boat, describing it as in said complaint stated; that said boat is wrongfully detained by the defendant from the plaintiff, that the alleged cause of such detention according to his best knowledge, information and belief is an unfounded

claim by said defendant that he is the sole owner of said boat, and that said boat has not been taken for a tax, assessment, or fine pursuant to a statute, nor seized under execution or attachment against the property of the plaintiff; and in said affidavit also stated the actual value of said boat as required by the provisions of section five hundred and eleven of the Code of Civil Procedure of the State of California. That thereupon the plaintiff's attorney in said action by an endorsement in writing on said affidavit required the sheriff of said city and county of San Francisco, the same being the county wherein said boat was then and there situated and claimed to be situated, to take said boat from the possession of said defendant Morgan, and the plaintiff then and there furnished a written undertaking executed by two sufficient sureties, approved by the sheriff, to the effect that they are bound to the defendant in double [9] the value of said boat as stated in said affidavit, for the prosecution of said action, for the return of the property to the defendant if return thereof be adjudged and for the payment to him of such sum as may from any cause be recovered against the plaintiff. That plaintiff delivered said undertaking and said affidavit with said notice, to wit: said endorsement thereon, to the said sheriff and thereupon said sheriff did take said boat into his official custody and did retain the same in such custody for more than five days prior to the delivery of said boat to the plaintiff and did without delay serve on said defendant a copy of said affi-

davit and said endorsement or notice thereon and of said undertaking by delivering the same together with a copy of said complaint and summons to said defendant personally. That no exception was taken by defendant to the sufficiency of the sureties on said undertaking, nor did said defendant give the sheriff a written undertaking for the return of the said boat to the defendant, as provided in section five hundred and fourteen of the Code of Civil Procedure of said State of California. That at no time did said defendant claim or require the return of said boat to him by said sheriff. That after the expiration of five days from the said taking of said boat by said sheriff and after the expiration of five days from the service of said notice to the defendant, the said sheriff delivered said boat to the plaintiff, who has ever since and does now hold possession of said boat pending the trial and judgment of said Superior Court in said action. That no claim was made to said sheriff by any third person prior to said delivery of said boat to said plaintiff. [10]

II.

That the said boat ever since its said delivery by said sheriff to the plaintiff in said action of claim and delivery, has been and is now in the custody of the law of said State of California and in the custody of said Superior Court, and not in the custody of said plaintiff. That said plaintiff now holds said boat in said *custodia legis* to abide the judgment of said Superior Court in said action, and it has been so decided by the courts of Califor-

nia (Bisconer vs. Billing, 71 Cal. App. 779; Riverside Portland Cement Co. vs. Taft, 192 Cal. 643; Hawi Mill & P. Co. vs. Leland, 56 Cal. App. 224). That section 521 of the Code of Civil Procedure requires the said Superior Court to protect said plaintiff in the custody of said property "until the final determination of the action." That said action is still pending in said Superior Court and awaiting trial therein.

III.

That said Hennessy has never had and has not now the custody or possession of said boat and has no right or authority from said plaintiff to deliver said boat to said Higgins as trustee in bankruptcy of said Morgan's estate, and is unable to make said delivery were he required to do so. That no service of said petition of said Higgins or of said order to show cause issued thereon, has been made on said plaintiff Arvid Pearson and there is no jurisdiction in said United States District Court or in said referee of his person and no jurisdiction to proceed on said petition or order to show cause, against him. That said Pearson is temporarily absent from said State of California. [11]

IV.

That prior to the filing of said petition on which said order to show cause is based the said Higgins as said trustee applied to said Superior Court for leave to file in said action of claim and delivery, his complaint in intervention. That said leave so applied for by said Higgins was granted him by said Superior Court and he thereupon and prior to the

filing of his said petition herein did file in said action and did serve on the plaintiff, a complaint in intervention as said trustee in which he alleges that said Morgan is the sole owner of said boat. That to said complaint in intervention the said plaintiff Arvid Pearson has filed in said action and served on said intervener an answer putting in issue said allegation of ownership and all other material allegations of said complaint in intervention. That said Higgins as such trustee has submitted himself to the jurisdiction of said Superior Court in said action by obtaining leave to file and by filing therein the said complaint in intervention and for that reason is estopped and precluded from litigating in any other *forum* the issues involved in said action of claim and delivery. That said Higgins as said trustee has never applied to said Superior Court for an order giving him possession of said boat.

V.

That said United States District Court and said referee have no jurisdiction of the matters presented in said petition of said Higgins as trustee, to wit: the said petition on which said order to show cause is based herein, in that at the time of the filing of said Morgan's voluntary petition in bankruptcy for himself individually only and long prior to the filing of said petition the said boat constituted a part of the assets of the partnership existing between him and the [12] said Arvid Pearson and for that reason the said United States District Court and said referee have no jurisdic-

tion in said bankruptcy proceedings over the said boat. That said Pearson is not insolvent and has never been adjudged a bankrupt, nor has said partnership ever been adjudged a bankrupt. That said boat prior to the filing of said voluntary petition of said Morgan in bankruptcy and at the time he was by said United States District Court adjudged a bankrupt thereon the said boat was partnership property of said Pearson and said Morgan and on that ground said Pearson is entitled to the possession of said boat as against said Higgins as trustee in bankruptcy of the estate of said Morgan. That said Pearson has not consented and does not consent to said boat being administered in said bankruptcy proceedings. That said Pearson claims the right to the possession of said boat as being part of said partnership property and makes said claim adversely to said Higgins as trustee of the estate of said bankrupt.

That said referee has no jurisdiction of said petition of said Higgins, on which said order to show cause was issued by said referee, by reason of the facts herein stated and for the further reason that at the time of the filing of said petition and ever since then the Judges of said United States District Court were not and have not been absent from the said division of said judicial district or sick or unable to act and the Clerk of the said United States District Court has not issued a certificate showing any such absence or sickness or inability to act, as required by subdivision 3 of

section 38 of the Bankruptcy Law of 1898 as amended. [13]

VI.

WHEREFORE the said respondents Arvid Pearson and A. J. Hennessy pray that said order to show cause be discharged and said petition on which the same is based be ordered dismissed for want of the necessary jurisdiction of the same by said United States District Court and by said Referee and also for want of the necessary jurisdiction of the person of said Pearson.

ALFRED J. HENNESSY,
In Pro Per.

ALFRED J. HENNESSY,
Attorney for Said Pearson for the Special Appearance Herein Made in His Behalf.

State of California,
City and County of San Francisco,—ss.

A. J. Hennessy being duly sworn deposes and says that he is one of the respondents herein; that he has read the foregoing plea to the jurisdiction and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on his information or belief; that as to those matters he believes it to be true.

ALFRED J. HENNESSY.

Subscribed and sworn to before me this 26th day of October, 1928.

[Seal] EVELYN LA FARGILL,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Oct. 27, 1928. [14]

[Title of Court and Cause.]

On Order to Show Cause upon Petition of Trustee to Arvid Pearson and A. J. Hennessy.

OPINION AND ORDER OF REFEREE ON PLEA TO JURISDICTION TAKEN BY RESPONDENTS.

Counsel Appearing:

A. J. HENNESSY, Esq., for Respondents.
CHARLES M. STARK, Esq., for the Trustee. [15]

The REFEREE.—The Referee's opinion is that the trustee by appearing in the state court proceeding does not prevent him from commencing a proceeding directly before this court for an order against the person in possession of this property, and that the Referee has jurisdiction of it. The person in possession is not an officer of the state court, and the order asked for is not an order against a Judge or an officer of the state court. If an order is sought against a Judge or an officer of the state court the trustee must make his application to a Judge of the Bankruptcy Court. It appears

that the boat is in the possession of Mr. Hennessy, acting as attorney for Mr. Pearson, as the result of a bond given in the claim and delivery proceeding instituted by Mr. Hennessy on behalf of Mr. Pearson, and that, therefore, the boat is not at the present time in the possession of either the state court or an officer of the state court. It further appears that the custody over the boat by the sheriff on execution proceedings on judgment obtained by one Pulin was released. The effect of such release was to restore possession of the boat to the bankrupt from whose possession it was taken by the sheriff. By the sheriff's release the boat came constructively within the custody of the Bankruptcy Court. The bankrupt has testified that up to the time of the claim and delivery action he was in actual possession of the boat. Subsequent to the release by the sheriff Mr. Hennessy commenced a proceeding in the state court under a writ to compel the sheriff to proceed with the sale under execution, which writ, under Mr. Hennessy's statement has been discharged, without prejudice. The Referee is of the opinion that the boat on the discharge of such writ at once came into the constructive possession of this Court, and whether or not the bankrupt obtained the actual custody on the discharge of the writ is immaterial. It is true, as you contend, Mr. Hennessy, that [16] this Court is without jurisdiction to administer upon this boat if the boat is partnership property; but as the boat is in the custody of this Court it has jurisdiction

to determine whether or not that boat is partnership property. The trustee, however, contends that the boat is not partnership property, but is the individual property of this bankrupt. It was not stated in the stipulation, but it has been brought out in the previous hearing, of which the Referee will take judicial notice, that Mr. Pearson is not within the jurisdiction of this court, and that the claim and delivery action brought on behalf of Mr. Pearson on the ground that the boat was partnership property was brought by Mr. Hennessy, as attorney for Mr. Pearson. Is that not correct, Mr. Hennessy?

Mr. HENNESSY—Yes.

The REFEREE.—(Contg.) The jurisdiction of the bankruptcy court of property, after the filing of the petition in bankruptcy is exclusive, where the property at the time of the filing of the petition was in the possession of the bankrupt, physically or constructively.

Mr. HENNESSY.—When a complaint is filed setting out that party is a partner in the property, it brings it out of the jurisdiction; but he has not submitted himself to the jurisdiction of the bankruptcy court, and the partner has not filed any petition in bankruptcy, it takes it out of the jurisdiction of this court.

The REFEREE.—On that point the Referee rules against you. But the claim that you are making in the state court that this property is partnership property, you are entitled to make in this

court. And the order of the Referee will be without prejudice to your right to set up and try out the question of partnership ownership in this court. This Court alone can determine to whom this boat belongs. [17]

Mr. STARK.—Will your Honor issue a restraining order prohibiting the disposition of the boat pending the Marshal taking the boat into his possession?

The REFEREE.—I think a restraining order is unnecessary.

Mr. HENNESSY.—I want time to answer the Higgins' petition. I will take an exception to the ruling of the Court, and ask leave to file a review of the Court's order. I want to get a stay of proceeding in this matter.

Mr. STARK.—At the same time I want the costs taxed.

Mr. HENNESSY.—I will ask for a five days' stay in this matter to file a petition of review, under Rule 9.

The REFEREE.—Your petition for review must be filed with the Referee.

Mr. STARK.—Pending all this, we do not want the administration of this estate delayed.

Mr. HENNESSY.—I will ask for a five days' stay. My reason is to give me time to file a review of the Court's order.

Mr. STARK.—At the same time, are you raising the question of the possession of the boat when it is in the possession of the Court?

Mr. HENNESSY.—We hope to get a stay of the Court's order. There is a question of law to be decided. I ask for five days' stay.

Mr. STARK.—It has come to our attention there was $450 worth of property moved off that boat.

Mr. HENNESSY.—I do not doubt that has come to Mr. Stark's attention. It is a question of fact whether it has, or not.

The REFEREE.—I will grant you five days' stay. [18]

Mr. STARK.—It is understood that no attempt to move the boat or change its position will be made: Is that correct?

Mr. HENNESSY.—I am not making any stipulation. I will comply with the law.

The REFEREE.—In the making of this order overruling the plea to the jurisdiction, the Referee goes further and holds that the trustee is entitled to the possession of the boat, and the order is that the boat be delivered to the trustee. Under this order of delivery, however, I will grant you a stay of five days.

So ordered.

[Endorsed]: Filed at 4 o'clock and 15 min. P. M., Nov. 1, 1928. [19]

[Title of Court and Cause.]

PETITION FOR REVIEW OF ORDER AND PROCEEDINGS OF REFEREE.

To the Honorable, the Judges of the Southern Division of the United States District Court, Northern District of California:

This, the petition of Arvid Pearson and A. J. Hennessy, respectfully shows: That in accordance with Rule 16 of said court they specially appear herein for the sole purpose of objecting to the jurisdiction of said court and its Referee, as more particularly hereinafter specified. That on the 27th day of October, 1928, A B. Kreft, Esq., Referee in Bankruptcy, made, filed and entered in the above-entitled matter and in summary proceedings before him pending, a certain order that the boat "Saxon" be delivered by said Pearson and Hennessy to A. W. Higgins, as Trustee in Bankruptcy of said Louis Morgan and as part of the bankrupt's estate. That said order has not been vacated or set aside, nor complied with. That said order is void and in excess of the jurisdiction of said United States Court and of said referee in the particulars specified and set forth in the plea to the jurisdiction, interposed and filed herein by said Pearson and Hennessy with said referee on the 27th day of October, 1928, in said summary proceedings and in their points and authorities supporting the said plea and filed in said matter on said [20] 27th day of October, 1928, with the said

Referee at the hearing of the petition of said Higgins as such trustee and on the order to show cause issued by said Referee and dated October 24th, 1928, directed to said Pearson and Hennessy and on file herein, upon the basis of which petition and order to show cause the said order of October 27th, 1928, for the delivery of said boat to said trustee in bankruptcy as part of the estate of said bankrupt was made by said referee. That neither said court or Referee had jurisdiction to make said order of October 27th, 1928 for said delivery of possession of said boat to said trustee, in that: (1) No service of said order to show cause was made on said Pearson. (2) That the claim of said Pearson to the boat referred to in said order of October 27th, 1928, is adverse to the trustee in bankruptcy of the estate of said Louis Morgan and was not shown in said proceedings before said referee to be merely colorable or made fraudulently or without right or in bad faith. (3) That said boat is not and never has been part of the said estate in bankruptcy of said Morgan. (4) That at the time of the making of said order of October 27th, 1928, the said boat was and is now in *custodian legis* of the State of California, and of the Superior Court, of said state, to wit: the Superior Court in and for the city and county of San Francisco in an action there pending and wherein said Morgan, said Pearson and said trustee in bankruptcy are parties and have appeared as such. That said action and the issue presented therein, involve the right of said Pearson as solvent partner of said Morgan

to the possession and the ownership of said boat, as partnership property, the said action being No. 199,620 in said Superior Court, and now at issue therein. (5) That no application was [21] ever made by said trustee in bankruptcy to said Superior Court for the possession of said boat. (6) That said boat is in possession of said Pearson and in said *custodia legis* and never has been and is not in the possession of said Hennessy. That said Pearson's possession of said boat is as solvent partner of said Morgan, said boat being property of the partnership of said Morgan and Pearson, said partnership existing prior to and at the time said Morgan filed herein his voluntary petition in bankruptcy and prior to and at the time he was adjudged a bankrupt herein by said United States District Court. That section 5 of the Bankruptcy Law deprives said court and said Referee of all jurisdiction over said boat in said bankruptcy proceedings by giving said Pearson as said solvent partner the right to the possession of said boat as against said trustee in bankruptcy. That said Pearson has always refused and still refuses to consent to the property of said partnership being administered in said bankruptcy case of Louis Morgan. (7) That said court and Referee have no jurisdiction or authority in summary proceeding to pass upon or determine on its merits the said adverse claim of said Pearson to the exclusive possession of said boat as partnership property. (8) That the Bankruptcy Law denies to said court and Referee the authority and jurisdiction to take possession of said

boat from said Pearson as said partner. (9) That the Bankruptcy Law denies the said trustee in bankruptcy all right to the possession of said boat. (10) That said Referee in overruling and in deciding at variance and in conflict with and against said plea to the jurisdiction filed with him herein on the 27th day of October, 1928, did so in violation of law. (11) That the petition of the trustee in bankruptcy, filed with said Referee herein on the 24th day of October, 1928, and upon which said order to show cause of that date and said order of October 27th, 1928, [22] are based, is insufficient in law to justify or sustain summary proceedings before said United States District Court or before said Referee for the possession of said boat in the matter of the said bankruptcy of said Morgan. (12) That neither the said petition of said trustee nor any evidence before said Referee shows nor tends to show, that the said claim of said Pearson to the possession of said boat is merely colorable and not adverse to said trustee in bankruptcy. (13) That said Referee erred and decided contrary to and in violation of law in overruling each of the said and foregoing objections of these petitioners. (14) That the said Referee erred and decided contrary to and in violation of law and exceeded his jurisdiction in making said order of October 27th, 1928. (15) That said Referee erred in overruling objections to evidence introduced by said trustee herein. (16) That said Referee erred and decided contrary to and in violation of law in ruling that the said plea to the ju-

risdiction, filed with him herein by said Pearson and Hennessy, is insufficient in law to constitute a bar to said summary proceedings and to said order of October 27th, 1928. That to each of said rulings of said Referee and to said order of October 27th, 1928, your petitioner then and there duly accepted. That your petitioners present in support of this petition, their points and authorities filed with said Referee on the 27th day of October, 1928, in the matter of said summary proceedings.

That heretofore, to wit: On the 19th day of August, 1927, the said Louis Morgan and said Arvid Pearson by instrument in writing signed, executed and delivered by them, entered into partnership and became copartners in said boat "Saxon" and in the business of owning, managing and operating said boat. That said copartnership continued in existence [23] until dissolved by legal effect of said adjudication in bankruptcy against said Morgan individually, to wit: on the 19th day of June, 1928. That said boat was not in possession of said Morgan at the time of his said adjudication in bankruptcy, nor at the time of the filing of his petition in bankruptcy, nor was said boat at any time in the possession of said court or said trustee or said Referee. That ever since the said 19th day of August, 1927, the said boat has been and is the property and an asset of said partnership, and in the possession of said partnership until delivered by process of law into the custody of said Pearson as solvent partner of said Morgan and as property of said partnership. That said A. J. Hennessy is

not and never has been the attorney in fact of said Arvid Pearson and has never held and does not hold possession of said boat for said Pearson or at all.

WHEREFORE, the said Arvid Pearson and said A. J. Hennessy pray that said summary proceedings before said Referee and said order of said Referee of October 27th, 1928, be by the said United States District Court adjudged *coram non judice* and in excess of the jurisdiction of said Referee and void. That said summary proceedings and said order of October 27th, 1928, be accordingly by the Court vacated, set aside and annulled. That these petitioners be granted such other, further or difference relief as may be just and in conformity with law, together with costs.

Dated at San Francisco, California, this the 30th day of October, 1928.

ALFRED J. HENNESSY,
Petitioner *in Pro Per.*
ALFRED J. HENNESSY,
Attorney for Petitioner Arvid Pearson by Special Appearance. [24]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

A. J. Hennessy, being duly sworn, deposes and says: That he is one of the petitioners herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated

on his information or belief; that as to those matters he believes it to be true.

ALFRED J. HENNESSY.

Subscribed and sworn to before me this 30th day of October, 1928.

[Seal] EVELYN LA FARGILL,

Notary Public in and for the City and County of San Francisco, State of California.

CERTIFICATE OF COUNSEL.

It is hereby certified that in my judgment the foregoing petition is well founded in law and in fact. I do further certify that said petition is not interposed for delay.

Dated at San Francisco this 30th day of October, 1928.

ALFRED J. HENNESSY,

Counsel for Petitioners. [25]

[Endorsed]: Receipt of a copy of the within petition for review of order and proceedings of Referee is hereby admitted this 30th day of October, 1928.

TORREGANO & STARK,

B.

Attorney for Trustee in Bankruptcy.

Filed Oct. 30, 1928, at 11 o'clock and 40 min. A. M. [26]

[Title of Court and Cause.]

REFEREE'S CERTIFICATE ON PETITION FOR REVIEW.

To the Honorable the Judges of the Southern Division of the United States District Court, for the Northern District of California, Second Division:

The undersigned Referee in Bankruptcy, to whom was referred the above-entitled matter, respectfully certifies and reports:

That on October 27th, 1928, Arvid Pearson and A. J. Hennessy, filed with the Referee a plea to the jurisdiction of the Referee to entertain a petition of A. W. Higgins, trustee herein, for an order requiring the delivery to the trustee of a boat named "Saxon," claimed by the trustee to be property of the estate, said Pearson and Hennessy appearing especially to object to the jurisdiction on the 27th day of October, 1928. The Referee made an order denying said plea to the jurisdiction. Said Pearson and Hennessy feeling aggrieved by reason of said order, filed herein on October 30th, 1928, their petition for review. The testimony in the proceedings was reported but has not been transcribed excepting the portion containing the Referee's order, which transcript of the Referee's order is transmitted herewith. [27]

The material facts I find to be as follows:

In his schedules the bankrupt schedules "interest in ship 'Saxon' located at Schultz's shipyard, 1138

Evans Avenue (San Francisco) $6,000." The construction of the vessel has not been completed. On the 8th day of September, 1924, one Joseph Pulin obtained a judgment against the bankrupt in the sum of $1,700 and on the 13th day of June, 1928, he procured a writ of execution out of the Superior Court of San Francisco, and the Sheriff levied upon said vessel. Louis Morgan filed his voluntary petition in bankruptcy on June 19th, 1928, and an adjudication was had the same day. The bankrupt immediately informed the Sheriff of the adjudication in bankruptcy, whereupon the Sheriff released the execution levied and returned the execution endorsed released. No custodian or receiver was appointed by this Court. The trustee, A. W. Higgins, was elected on the 25th day of September, 1928, and qualified on the 26th day of September, 1928. On the 11th day of September, 1928, Joseph Pulin in the action in the state court filed his affidavit praying that a writ of *venditioni exponas* issue out of said state court for the purpose of requiring the sheriff to proceed with the sale on execution. On September 27th, the trustee filed with the Referee a petition for an order authorizing him to intervene in said state court action of Pulin vs. Morgan, which petition was granted. The trustee appeared in the state court proceedings and filed a copy of the Referee's order. Mr. A. J. Hennessy is attorney for Pulin. Following the proceedings to require the sheriff to proceed with the execution, to wit, on the 24th day of September, 1928, said A. J. Hennessy on behalf of said Arvid

Pearson commenced a proceeding in said Superior Court against Louis Morgan, the bankrupt, and others in claim and delivery, asserting that [28] said vessel is the partnership property of a copartnership composed of said Arvid Pearson and Louis Morgan (the bankrupt). Said Pearson at the time of the commencement of said claim and delivery action was not within the State of California, and up to the time of the hearing before the Referee has not been personally within this jurisdiction. The proceeding was commenced in the name of Pearson by said A. J. Hennessy. Upon the filing of the necessary bond at the instance of said A. J. Hennessy, the vessel came into the possession and under the control of said A. J. Hennessy, acting for said Arvid Pearson. On October 4th, 1928, the trustee, A. W. Higgins, filed with the Referee a petition to intervene in the claim and delivery proceeding in the state court, which was granted, and the trustee thereafter appeared in said proceeding. Thereafter the proceedings pursuant to the affidavit and prayer for a writ of *venditioni exponas* was, at the instance of A. J. Hennessy, the affiant in the affidavit praying for said writ, dismissed by the said state court without prejudice. No ruling has been made by the state court in the claim and delivery proceeding. Following the dismissal the affidavit for said writ of *venditioni exponas* and the intervention of the trustee in the claim and delivery proceeding, the trustee filed a petition with the Referee for an order against said Pearson and Hennessy to show cause,

if any they have, why the boat "Saxon" should not be delivered over and the possession thereof given to A. W. Higgins, trustee herein. Upon the return day of such order to show cause, said A. J. Hennessy as attorney for Arvid Pearson, and appearing for himself personally, entered a special appearance and filed a plea to the Referee's jurisdiction to make the order prayed for by the trustee. Upon the hearing [29] of such plea, the bankrupt was sworn and examined, and testified that from the time of the release of the levy on execution by the sheriff in the case of Pulin vs. Morgan he was in possession of said vessel until the possession was taken from him in the claim and delivery action aforesaid.

The Referee held that upon the release of the vessel by the sheriff in the execution proceedings in the case of Pulin vs. Morgan the vessel at once came into the custody of this Court and was in the custody of this Court at the time of the commencement of the claim and delivery action. The plea to the jurisdiction was overruled and an order was made requiring said A. J. Hennessy to deliver possession of said boat to the trustee.

In their petition for review Pearson and Hennessy state that the "Referee in Bankruptcy, made, filed and entered in the above-entitled matter and in summary proceedings before him pending, a certain order that the boat 'Saxon' be delivered by said Pearson and Hennessy to A. W. Higgins as trustee in Bankruptcy of said Louis Morgan and as part

of the bankrupt's estate. (Underscoring mine.)"
The underscored portion of the statement is not correct. The Referee has not decided that the boat is "part of the bankrupt's estate." On the contrary, the Referee stated (Pg. 3 of the Transcript) that if it should be made to appear that the boat is partnership property that the Bankruptcy Court was without jurisdiction to administer upon the boat as an asset in this state. The trustee, however, contends that the boat is not partnership property, but is the individual property of the bankrupt, and at page 4 of the transcript transmitted herewith the Referee stated that his order was "without prejudice to your right (referring to said Pearson and Hennessy) to set up and try [30] out the question of partnership ownership in this Court." The ruling of the Referee goes no further than to hold that the boat on the release of execution came into the possession of this Court and this Court cannot surrender its jurisdiction to determine the ownership of said property.

At the commencement of this proceeding the status of this boat and the facts concerning the same were not clearly developed before the Referee and he was of the opinion that as a matter of comity the trustee should make his appearance in the state court upon the execution proceedings and later upon the claim and delivery proceeding. Such appearance by the trustee in the state court, however, does not divest the Bankruptcy Court of its paramount jurisdiction. The Referee upon subsequent pro-

ceedings reached the conclusion that such paramount jurisdiction should be exercised. A case decided by the U. S. Circuit Court of Appeals of the 6th Circuit on June 18th, 1928, found in American Bankruptcy Reports, Advance Sheets, Volume 12, No. 3, October, 1928, is directly in point. I quote from the syllabi as follows:

> "The fact that a trustee in bankruptcy, in deference to a state court, appears therein and asks that a state court receiver be directed to turn over property of bankrupt to him does not render the decision of the state court *res judicata* as to the right to the property and thereby deprive the bankruptcy court of power to order, in summary proceedings, the state receiver to turn the property over to the receiver in bankruptcy."

The Referee's reasons for authorizing the trustee to appear in the matter of Pulin vs. Morgan upon the obtaining of the writ of *venditioni exponas* was that it was not clear to him that the effect of such writ might not be to continue [31] the jurisdiction of the state court over the vessel, the state court having acquired possession of the vessel upon Pulin's execution. Now, it appears that such writ has been discharged and the only ground upon which Pearson and Hennessy claim that the boat is in the custody of the state court is by virtue of the claim and delivery action. This action, however, was not commenced until September 24th, 1928, about three months after the commencement of this bankruptcy proceeding and at

that time the Referee finds the boat was in the possession of the bankrupt, and therefore, within the custody of this Court. The possession of the bankrupt becomes the possession of the Court. See Collier on Bankruptcy, page 783, and cases cited therein. The rule goes further, quoting from Collier, page 779.

> "The rule which gives the bankruptcy court exclusive jurisdiction to determine claims to property in its custody is not limited to actual possession, but extends to constructive possession as well, including property held not only by but for the bankrupt."

See, also, Matter of Diamond's Estate, 44 A. B. R. 268 and case of Orinoco Iron Co. vs. Metzel, 36 A. B. R. 247. Quoting from the syllabi thereof

> "The exclusive jurisdiction of the bankruptcy court over the general administration of the bankrupt's estate carries with it exclusive authority to determine not only the claims of creditors, but also adverse claims, whether by way of ownership or paramount liens." [32]

and also holding that constructive possession is sufficient.

The claim and delivery proceeding was a proceeding improperly commenced, and being commenced after the filing of the petition in bankruptcy will be considered of no force and effect. In the U. S. Supreme Court case of White vs. Schloerb, 4 A. B. R. 178, it was held:

> "Where goods so held in the custody of the District Court have been seized upon a writ of replevin from a state court, the District Court sitting in bankruptcy has jurisdiction by summary proceedings to compel the return of the property seized."

The petition for review assigns as error the fact that the trustee's petition for order to show cause was not served upon Arvid Pearson. Service on Pearson was not required. Service upon the person having the custody or control of the boat alone was necessary, and that person is Mr. A. J. Hennessy. Mr. Pearson is without the jurisdiction and the claim and delivery proceeding is a proceeding by A. J. Hennessy in Pearson's name. The proceeding taken by Mr. Hennessy in the state court has caused much delay and necessarily some expense to the estate. Mr. Hennessy, immediately upon the release of the execution, should have applied to this court on behalf of Mr. Pearson for possession of the boat under his asserted claim that the boat is partnership property, and therefore not subject to administration in this proceeding. The Referee's order leaves open to him such a proceeding.

Mr. Hennessy cites a number of cases upon the point that an adverse claimant is entitled to have his claim determined by plenary suit. This question is not involved here, [33] as such right to plenary suit exists only where the adverse claimant was in possession before the bankruptcy and remains in possession. The only possession on which

it is claimed the state holds jurisdiction is a possession obtained when the boat was taken from the bankrupt in the claim and delivery proceeding after the commencement of the bankruptcy proceeding, and as stated above, wrongfully taken while the boat was in the custody of this Court.

I deem it unnecessary to comment upon the various assignments of error which are concerned in the main with the jurisdiction of the court over copartnership property. Concededly the Court cannot administer upon partnership property once it is established that the property in the custody of the Court is a partnership and not an individual asset. The sole issue in the matter is—did the vessel come into the custody of this court upon the release by the sheriff of the execution in the case of Pulin vs. Morgan. In my opinion, said release placed the property in the custody of this Court and that it was wrongfully taken therefrom in said claim and delivery proceeding and that any person claiming said property must apply to this Court, which cannot surrender its exclusive jurisdiction acquired by such custody.

Dated: November 1, 1928.

Respectfully submitted,

A. B. KREFT,

Referee in Bankruptcy. [34]

Papers transmitted:

1. Partial transcript of proceedings containing opinion and order of Referee.

2. Plea to jurisdiction on behalf of Arvid Pearson and A. J. Hennessy.

3. Points and authorities in support of said plea.

4. Petition for review of order and proceedings of Referee.

5. Praecipe accompanying petition for review.

6. Petition of trustee to intervene in action of Pulin vs. Morgan.

7. Order to intervene in action of Pulin vs. Morgan.

8. Petition of trustee to intervene in action of Pearson vs. Morgan.

9. Order to intervene in action of Pearson vs. Morgan.

10. Petition of trustee for order to show cause and order to show cause, the subject of review.

[Endorsed]: Filed at 4 o'clock and 15 Min. P. M. Nov. 1, 1928. [35]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 19th day of November, in the year of our Lord one thousand nine hundred and twenty-eight. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—NOVEMBER 19, 1928—ORDER SUBMITTING PETITION FOR REVIEW, ETC.

This matter came on regularly for hearing on (1) report of Referee on petition to review, etc.; (2) motion for order staying order of Referee; and (3) order to show cause why A. J. Hennessy should not be guilty of contempt. After argument by counsel for respective parties, the Court ORDERED said matter submitted on brief and affidavit to be filed in 3 days. [36]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 9th day of January, in the year of our Lord one thousand nine hundred and twenty-nine. Present: The Honorable HAROLD LOUDERBACK, Judge.

[Title of Cause.]

MINUTES OF COURT—JANUARY 9, 1929—ORDER DENYING PETITION FOR REVIEW, ETC.

The Referee's certificate on petition for review, petition for review, and motion to adjudge in con-

tempt, heretofore argued and submitted, being now fully considered, IT IS ORDERED that the Referree's report be and the same is hereby confirmed; the petition for review be and the same is hereby denied; and the motion to adjudge in contempt be and the same is hereby denied. [37]

[Title of Court and Cause.]

APPEAL AND ORDER ALLOWING APPEAL.

The above-named Arvid Pearson and A. J. Hennessy, conceiving themselves aggrieved by the order and decree of the Southern Division of the United States District Court, Northern District of California, made and entered on the 9th day of January, 1929, in the above-entitled matter of Louis Morgan, a bankrupt, doth hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, and pray that this appeal be allowed, and that a transcript of the record and proceedings and papers upon which said order and decree were made, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit as required by law, on said appeal. [38]

A. J. HENNESSY and
GEO D. COLLINS, Jr.,
Attorneys for Said Appellant Arvid Pearson.

A. J. HENNESSY,
Appellant *in Pro Per.*

Dated at San Francisco this 12th day of January, 1929.

And now to wit, on January 15th, 1929, IT IS ORDERED that the foregoing appeal be and it is hereby allowed as prayed for, the same to operate a *supersedeas* on the order and decree therein specified and on the order of the Referee in Bankruptcy of date October 27th, 1928, in the said matter of Louis Morgan, a bankrupt.

HAROLD LOUDERBACK,
United States District Judge.

[Endorsed]: Filed at 4 o'clock P. M., Jan. 15, 1929. [39]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the 15th day of January, 1929, in this same term, to wit, the October Term, 1928, of the United States Circuit Court of Appeals for the Ninth Circuit, and before the Honorable Judges of the said United States Circuit Court of Appeals, come Arvid Pearson and A. J. Hennessy, the appellants in the above-entitled matter of Louis Morgan, bankrupt, and in the above-entitled cause, and say there is manifest error in the record and proceedings in said matter and cause, and respecting the order and decree of the said United States District Court, Southern Division, Northern District of California, to wit, the order and decree of date January 9th, 1929, made and

entered in said matter of Louis Morgan, a bankrupt, and in the following particulars, viz.: [40]

I.

That the said Southern Division of the United States District Court in and for the Northern District of California, erred in its order, decision and decree of January 9th, 1929, in the said matter of Louis Morgan, a bankrupt, in denying the petition of said appellants as petitioners for a review and annullment of the order of the Referee in bankruptcy of said Morgan, and of date October 27th, 1928, to wit, the order requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt.

II.

That the said United States District Court erred in its order, decision and decree of January 9th, 1929, in the said matter of Louis Morgan, a bankrupt, in confirming and approving the report, certificate and said order of the Referee in bankruptcy of said bankrupt, to wit, said order of October 27th, 1928.

III.

That the said United States District Court erred in its order, decision and decree of January 9th, 1929, in confirming, affirming and approving the order of the Referee in bankruptcy in the said matter of Louis Morgan, a bankrupt, to wit, the order of said Referee of October 27th, 1928, requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt.

IV.

That the said United States District Court erred in its ruling and decision adverse to the plea of appellants to the jurisdiction of the Referee in bankruptcy of Louis Morgan, a bankrupt, in the matter of the said order of said Referee of October 27th, 1928, and the proceedings on which the said order is based, to wit, the order of said Referee [41] directing appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt.

V.

That the said United States District Court erred in its ruling and decision adverse to the plea of appellants to the jurisdiction of the said court and its Referee in bankruptcy of the said Louis Morgan, a bankrupt, to order said appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy of said bankrupt.

VI.

That the said United States District Court erred in its ruling and decision that said court and its Referee have competent jurisdiction to order in summary proceedings, that appellants deliver possession of the boat "Saxon" to the trustee in bankruptcy of said Louis Morgan, a bankrupt.

VII.

That the said United States District Court erred in its decision and ruling that the said order of the Referee in bankruptcy of said Louis Morgan, of October 27th, 1928, requiring in summary proceed-

ings, that appellants deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt, is valid and that it is not void for want of authority and for want of jurisdiction to make said order.

VIII.

That the said United States District Court erred in its decision, ruling, order and decree requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said Louis Morgan, a bankrupt.

IX.

That the said United States District Court erred in its decision overruling the objection of appellants as petitioners, to the jurisdiction of said court and its Referee in bankruptcy [42] of said Louis Morgan, a bankrupt, to require and order appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy of said bankrupt.

X.

That the said United States District Court erred in its decision denying the petition of appellants for an order and decree quashing and annulling the order of said Referee in bankruptcy of said Louis Morgan, a bankrupt, requiring appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy of said bankrupt, there being no answer filed to said petition by the said trustee in bankruptcy.

XI.

Whereas by the law of the land pertaining to the

matter, the said petition of appellants to the said United States District Court for the review and annullment of said order of said Referee in bankruptcy, to wit, said order of October 27th, 1928, requiring appellants to deliver the possession of the boat "Saxon" to said trustee in bankruptcy of Louis Morgan, a bankrupt, should have been granted by the Court and not denied.

XII.

Wherefore the said appellants Arvid Pearson and A. J. Hennessy pray that the said order and decree of the said United States District Court, of date January 9th, 1929, denying said petition of appellants for the review and anullment of said order of said Referee, of date October 27th, 1928, and the said order and decree of said United States District Court, confirming, approving and sustaining said order of said Referee, together with the said order of said Referee, *be reversed* by the said United States Circuit Court of Appeals for the Ninth Circuit, upon the appeal herein from said orders and decree, and that the appellants be granted [43] such other and further relief as may be just and in conformity with law.

Dated this 15th day of January, 1929.

A. J. HENNESSY, and
GEO. D. COLLINS, Jr.,
Attorneys for Appellant Arvid Pearson.
A. J. HENNESSY,
Appellant *in Pro Per.*

[Endorsed]: Filed at 4 o'clock P. M., Jan. 15, 1929. [44]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Arvid Pearson and A. J. Hennessy, as principals and Virgil J. Garibaldi and Vera M. Huffman, as sureties, are held and firmly bound unto A. W. Higgins as trustee in bankruptcy of Louis Morgan, a bankrupt in the full and just sum of two hundred and fifty dollars, to be paid to the said A. W. Higgins as said trustee in bankruptcy, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 12th day of January, in the year of our Lord one thousand nine hundred and twenty-nine.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit depending in said court between the said Arvid Pearson and A. J. Hennessy as petitioners and the said A. W. Higgins as respondent a decree was rendered against the said petitioners, and the said Arvid Pearson and A. J. Hennessy, having obtained from said court an allowance of an appeal to reverse the said decree in the aforesaid suit, and a citation directed to the said A. W. Higgins as said trustee in bankruptcy of said Louis Morgan, a bankrupt, citing and admonishing him to be and appear at a United States Circuit Court of Appeals for the Ninth Cir-

cuit, to be holden at San Francisco, in the State of California, thirty days from this 12th day of January, 1929. [45]

Now, the condition of the above obligation is such, that if the said Arvid Pearson and A. J. Hennessy shall prosecute the said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

This recognizance shall be deemed and construed to contain the "express agreement" for summary judgment, and execution thereon, mentioned in Rule 34 of the District Court.

ARVID PEARSON (Seal)
A. J. HENNESSY. (Seal)
VIRGIL GARIBALDI. (Seal)
VERA M. HUFFMAN. (Seal)

Acknowledged before me the day and year first above written.

[Seal] HELEN CLARKE,
Notary Public in and for the City and County of San Francisco.

United States of America,
Northern District of California,—ss.

Virgil J. Garibaldi and Vera Huffman being duly sworn, each for himself, deposes and says, that he is a householder in said District, and is worth the sum of two hundred and fifty dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

VIRGIL J. GARIBALDI.
VERA M. HUFFMAN.

Subscribed and sworn to before me, this 12th day of January, A. D. 1929.

[Seal] HELEN CLARKE,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed at 4 o'clock P. M., Jan. 15, 1929.

Form of bond and sufficiency of sureties approved this January 15th, 1929.

HAROLD LOUDERBACK,

Judge. [46]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON APPEAL.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 46 pages numbered from 1 to 46, inclusive, contain a full, true and correct transcript of the records and proceedings in the Matter of Louis Morgan, in Bankruptcy, No. 17,170, as the same now remain on file and of record in this office; said transcript having been prepared in accordance with the praecipe for transcript (copy of which is embodied herein), excepting items four and seven thereof—the original documents not being on file in this office.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of nineteen dollars and fifty-five cents ($19.55)

and that the same has been paid to me by the attorneys for the appellants herein.

Annexed hereto is the original citation on appeal.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 18th day of March, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [47]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to A. W. Higgins as Trustee in Bankruptcy of Louis Morgan, a Bankrupt, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Southern Division of the Northern District of California, wherein Arvid Pearson and A. J. Hennessy, are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellants, as in the said order allowing appeal mentioned, should not be corrected, and why

speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Southern Division of the United States District Court, Northern District of California, this 15th day of January, A. D. 1929.

HAROLD LOUDERBACK,
United States District Judge.

United States of America,—ss.

On this 16th day of January, in the year of our Lord one thousand nine hundred and twenty-nine, personally appeared before me, Peter Wedvig, the subscriber, and makes oath that he delivered a true copy of the within citation to A. W. Higgins, as trustee in bankruptcy of Louis Morgan, a bankrupt, said Higgins being the appellee and the person named in the within citation, as such appellee.

Subscribed and sworn to before me at San Francisco, this 16th day of January, A. D. 1929.

PETER WEDVIG.

Subscribed and sworn to before me this 16th day of January, 1929.

[Seal] MARK E. LEVY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Citation on Appeal. Filed at 3 o'clock and 40 min. P. M. Jan. 16, 1929. [48]

[Endorsed]: No. 5736. United States Circuit Court of Appeals for the Ninth Circuit. Arvid Pearson and A. J. Hennessy, Appellants, vs. A. W. Higgins, as Trustee in Bankruptcy of Louis Morgan, a Bankrupt, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 18, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

No. 5736.

In the Matter of LOUIS MORGAN, Bankrupt.

ARVID PEARSON and A. J. HENNESSY,

Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of LOUIS MORGAN, a Bankrupt,

Appellee.

SUPERSEDEAS BOND.

WHEREAS on the 25th day of February, 1929, the said United States Circuit Court of Appeals for the Ninth Circuit made and entered in the above-entitled cause an order that the appellants

therein "execute a supersedeas bond in the sum of two thousand dollars." NOW THEREFORE, we, the said appellants Arvid Pearson and A. J. Hennessy, as principals and Lucius L. Solomons and V. J. Garibaldi, of the city and county of San Francisco, State of California, as sureties, are held and firmly bound unto the above-named A. W. Higgins, appellee, as trustee in bankruptcy of Louis Morgan, a bankrupt, in the penal sum of two thousand dollars to be paid said appellee, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators jointly and severally firmly by these presents.

Sealed with our seals and dated the 12th day of March, A. D. 1929.

The condition of this obligation is such, that if the above-named appellants shall prosecute their appeal herein to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

ARVID PEARSON.
A. J. HENNESSY.
LUCIUS L. SOLOMONS.
V. J. GARIBALDI.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Lucius L. Solomons and V. J. Garibaldi, being duly sworn, each for himself, deposes and says that

he is a resident of the city and county of San Francisco and a householder therein, and has subscribed his name to the foregoing bond as one of the sureties thereon; that he is worth the sum of two thousand dollars over and above all his debts and liabilities exclusive of property exempt from execution.

V. J. GARIBALDI.
LUCIUS L. SOLOMONS.

Subscribed and sworn to before me this 12th day of March, 1929.

[Seal] EVELYN LA FARGILL,
Notary Public in and for the City and County of San Francisco, State of California.

The foregoing supersedeas bond is hereby approved this 14th day of March, 1929.

FRANK H. RUDKIN,
United States Circuit Judge.

[Endorsed]: Filed Mar. 14, 1929. Paul P. O'Brien, Clerk.

No. 5736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY, *Appellants*, vs. A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a bankrupt), *Appellee*.	

BRIEF FOR APPELLANTS.

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No. 5736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a bankrupt),
Appellee.

BRIEF FOR APPELLANTS.

I.

STATEMENT OF CASE.

This is an appeal from an order and decree of the Southern Division of the United States District Court, Northern District of California, Honorable Harold Louderback, Judge, confirming the report of a referee in bankruptcy of one Louis Morgan, a bankrupt, and denying a petition for review of the order of the said referee made in *summary proceedings* instituted by the appellee as trustee of the bankrupt, said order directing appellants to deliver possession of the boat "Saxon" to him as such trustee, and this despite their *bona fide* and very substantial claim of title to the boat, adverse to the bankrupt and the trustee, and

despite the fact that the boat is in *custodia legis* of the Superior Court of the State of California, in and for the City and County of San Francisco, and despite the fact that it was established before the referee, without conflict of evidence and before the United States District Court, without conflict of evidence, that the boat is partnership property of the bankrupt and appellant Pearson, and as such expressly excluded from the bankruptcy proceedings by the concluding clause in Section 5 of the Bankruptcy Act of 1898, the partnership not being involved in nor a party to the bankruptcy proceedings and never as a partnership, having been adjudged bankrupt, but the petition in bankruptcy and the adjudication in bankruptcy being restricted to Morgan individually and not extending to or including the partnership (R. 9, 11, 12, 13, 14, 15, 21 to 27, 30), and the appellant, the copartner Pearson, never having consented that any of the partnership property be administered in the bankruptcy Court. (R. 15.)

The *summary proceedings* before the referee were instituted by the appellee as trustee in bankruptcy of Morgan, by petition on October 24, 1928 (R. 2), setting forth the *custodia legis* of the boat by the state Court, *on the adverse claim of Pearson, but not alleging his claim to be merely colorable*, and alleging the filing of Morgan's voluntary petition in bankruptcy on June 19, 1928, and the adjudication upon it the same day. There is no averment nor contention that application was made by the trustee to the state Court for possession of the boat and the fact is that no such application was ever presented. This also is conclu-

sive against the trustee's petition, as held in *Carling v. Seymour Lumber Co.*, 113 F. 485, 491. In the *summary proceedings* an order was issued to the appellant Pearson and his attorney the appellant Hennessy, by the referee, requiring them to show cause why they "should not immediately turn over and deliver to the said A. W. Higgins, trustee herein, the possession of the boat 'Saxon'." (R. 6.) To these proceedings before the referee the appellants Pearson and Hennessy interposed and filed their *sworn* plea to the jurisdiction (R. 7), stating therein that they specially appeared for the purpose of making the plea, that the order to show cause had not been served on Pearson, that he was absent from the State of California, that the boat was in *custodia legis* of the state Court, that it never had been in the custody or possession of Hennessy, that the trustee was a party to the action in the state Court and was there litigating on its merits the alleged claim to the boat as made by him in his capacity of such trustee, that he had submitted himself as trustee to the jurisdiction of the state Court, that he never applied to the state Court for possession of the boat, that the boat is partnership property and as such not subject to the jurisdiction of the United States District Court or its referee in the bankruptcy proceedings of Morgan, that appellant Pearson is not insolvent and has never been adjudged bankrupt, that the partnership has never been adjudged bankrupt, that under the concluding clause in Section 5 of the Bankruptcy Act of 1898, the appellant Pearson, as a copartner of Morgan is entitled to the possession of the boat as against the trustee in bankruptcy, and

that Pearson has not consented and does not consent to the boat being administered in the bankruptcy proceedings. *There was no answer filed to the plea* and therefore as held by all the authorities on the point, some of them hereinafter cited, its averments are to be taken as true. The referee overruled the plea (R. 21) and ordered appellants to deliver the boat to the appellee as trustee in bankruptcy. Thereupon and within three days after the order was made (R. 22, 28, 29), the appellants proceeding under Rule 9 of the rules in bankruptcy of the District Court and General Order XXVII of the general orders in bankruptcy, filed in the District Court, their *sworn* petition for review of the order and proceedings of the referee and in the petition set forth the facts relative to the plea to the jurisdiction and the proceedings thereon; also alleged the referee's said order, and that the boat in partnership property, and in *custodia legis* of the state Court, and that there existed no jurisdiction in the bankruptcy proceedings, for the following enumerated reasons, to wit: (1) that no service of the referee's order to show cause had been made on Pearson. (2) That Pearson's claim to the boat is adverse to the trustee in bankruptcy and was not alleged nor shown to be merely colorable or without right, in the summary proceedings before the referee. (3) That the boat is partnership property and therefore not subject to the jurisdiction in bankruptcy of Morgan individually. (4) That the boat is not in the custody or possession of appellants, but is in *custodia legis* of the state Court. (5) That no application was ever made to the state Court by the

trustee, for possession of the boat. (6) That Section 5 of the Bankruptcy Act of 1898 denies to the United States District Court and its referee, all jurisdiction over the boat, it being partnership property. (7) That the said United States District Court and its referee have no jurisdiction or authority in *summary proceedings* to pass upon or determine on its merits the said adverse claim of Pearson to the exclusive possession of the boat as partnership property. (8) That the bankruptcy statute denies said Court and its referee the authority and jurisdiction to take possession of the boat from Pearson as said copartner of Morgan. (9) That the statute denies the trustee all right to the possession of the boat. (10) That the trustee's petition to the referee for possession of the boat is insufficient in law to justify or sustain *summary proceedings* before the District Court or its referee for possession of the boat. (11) That neither the trustee's petition or the evidence before the referee shows or tends to show that the claim of Pearson to the boat is merely colorable and not adverse. (12) That ever since the 19th day of August, 1927, the boat has been and is the property and an asset of the partnership of appellant Pearson and the bankrupt Morgan and in the possession of the partnership until delivered by process of law *pendente lite*, into the custody of Pearson as solvent partner of Morgan and as property of the partnership. It is also averred in the *sworn* petition for review that appellant Hennessy is not and never has been attorney in fact of Pearson and has never held and does not hold possession of the boat. *No answer was ever filed to the sworn petition*

for review (R. 1, 2, 48), and therefore its averments are to be taken as true, as held by the authorities hereinafter cited on the point.

The questions presented by appellants in support of their appeal are sufficiently indicated in the foregoing statement of the case. *The referee expressly states that he makes no ruling as to whether the boat is partnership property or not and expressly concedes that if it is partnership property, he has no jurisdiction to make the order* (R. 18, 19. 20. 32, 33. 37); he bases his decision and order entirely upon the plainly erroneous and untenable ground that when the boat was released from levy by the sheriff upon execution issuing out of the state Court in the case of *Pulin v. Morgan,* it at once *ipso facto* came within the custody and possession of the bankruptcy Court by operation of law (R. 30, 32, 33, 34, 35, 37), although at the time Morgan filed his petition in bankruptcy and at the time he was adjudged a bankrupt, he did not have possession or custody or control of the boat, but it was then and thereafter in *custodia legis,* having been prior to the filing of Morgan's petition in bankruptcy, levied upon and seized by the sheriff upon said execution. (R. 30, 32, 34.)

II.

SPECIFICATION OF ERRORS.

1. The referee and the District Court erred in overruling the plea to the jurisdiction.

2. The referee and the District Court erred in ordering appellants to deliver possession of the boat "Saxon" to the trustee in bankruptcy.

3. The referee and the District Court erred in ruling and deciding that they had competent jurisdiction in bankruptcy to make said order requiring appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy.

4. The referee and District Court erred in ruling and deciding that in *summary proceedings* they had competent jurisdiction to make said order requiring appellants to deliver possession of said boat to the trustee in bankruptcy.

5. The referee and the District Court erred in ruling and deciding that said boat came into the custody and possession of the bankruptcy Court subsequent to the adjudication in bankruptcy as to the bankrupt Louis Morgan and as against the appellants.

6. That the said order of the said District Court and its referee requiring appellants to deliver possession of said boat "Saxon" to the trustee in bankruptcy of said Morgan, is void for want of jurisdiction over the appellant Pearson, he never having been served with the order to show cause, and also void for want of jurisdiction over the subject matter, the boat being partnership property, and not the individual property in severalty of the bankrupt Morgan, and not being in his custody, control or possession at the time of the adjudication in bankruptcy nor at the time he filed his petition in bankruptcy.

7. That the District Court erred in confirming the report of the referee.

8. That the District Court erred in denying the petition for review filed therein by appellants and in refusing to reverse, annul and set aside said order of the referee requiring appellants to deliver possession of said boat to the trustee in bankruptcy.

9. That said order of the referee and of the District Court made in summary proceedings and requiring appellants to deliver possession of said boat to the trustee in bankruptcy, operates to deprive said appellant Pearson of his property without due process of law and is therefore in violation of the Fifth Amendment of the Constitution of the United States.

10. That the said order of the referee and of the District Court requiring appellants to deliver possession of said boat to the trustee in bankruptcy, is in violation of the concluding clause in Section 5 of the Bankruptcy Act of 1898, excluding partnership property from the jurisdiction of the bankruptcy Court where the petition and adjudication relate only to one of the partners individually, and do not extend to nor include the partnership, and there is no consent by the solvent partner to have any of the partnership property administered in the bankruptcy proceedings.

These specifications of error are sustained by the assignments in the record. (R. 41 to 45.)

III.

BRIEF OF ARGUMENT.

1. VALID APPEAL.

The case is properly appealed to the United States Circuit Court of Appeals, under Section 24a of the Bankruptcy Act as amended May 28, 1926. (44 Stat. 662.)

> Taylor v. Voss, 271 U. S. 180, 181, 183; 46 S. C. Rep. 461, 463, 464, 465;
> Harrison v. Chamberlin, 271 U. S. 191, 193;
> Gibbons v. Goldsmith, 222 F. 826, 828;
> Clark v. Huckaby, 28 F. (2d) 154, 156, 157.

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2. NO JURISDICTION TO MAKE ORDER FOR DELIVERY OF BOAT TO TRUSTEE.

That the boat "Saxon" is *partnership property* of the bankrupt Morgan and the appellant Pearson, is distinctly alleged in the *sworn* plea to the jurisdiction and in the *sworn* petition for review (R. 8, 14, 15, 23, 24, 26), and not controverted by answer. This in law requires the Court to consider the boat, partnership property, in these proceedings.

> Matter of Benson & Kinsler, 25 F. (2d) 756;
> Matter of Western Rope & Mfg. Co., 298 F. 926;
> Matter of Goldstein, 216 F. 887, 888;
> Matter of Blum, 202 F. 883;
> Matter of Farmers & M. Bank, 190 F. 726, 728;
> Cooney v. Collins, 176 F. 189, 192, 193;
> Matter of Kane, 131 F. 386, 387;

Remington on Bankruptcy (3d Ed.) Sec. 2436 at pages 586, 587; Sec. 2438 at page 582; Sec. 2439 at page 588; Sec. 2440 at page 589. Also Sections 3655 and 3657.

This being the well settled law on the point and it being therefore established by the record that the boat is partnership property, it results that the District Court and its referee had no jurisdiction over it in the bankruptcy proceedings as based on the voluntary petition in bankruptcy, of Morgan individually. This is clearly the legal effect of the concluding clause in section 5 of the Bankruptcy Act of 1898, denying and excluding the jurisdiction. The law is so stated in:

In re Mercur, 122 F. 384, 387, 388;

In re Bertenshaw, 157 F. 363, 367, to 373;

Meek v. Centre County Banking Co., 268 U. S. 426, 431, 432, 433, 434; 45 S. C. Rep. 560, 562, 563;

Williams v. Lane, 158 Cal. 39, 43, 44, 45;

4 Cal. Jur., Sec. 20, p. 69;

7 Corpus Jur. 132;

Collier on Bankruptcy, (13th Ed.) 233, 236;

Remington on Bankruptcy, (3d Ed.) Secs. 2906, 2909, 2910.

Therefore as the District Court and its referee had no jurisdiction over the boat "Saxon," *it being partnership property,* the order requiring appellants to deliver possession of the boat to Morgan's trustee in bankruptcy, is clearly void, and the decision and decree of the District Court refusing to annul and quash it on the petition for review is clearly reversible error.

3. CUSTODIA LEGIS OF STATE COURT.

In the next place, the state Court having competent jurisdiction in the claim and delivery action there pending, to determine the right to the possession of the boat as to all the parties in the litigation, including the trustee in bankruptcy of Morgan, and the boat being *in custodia legis,* the bankruptcy Court had no jurisdiction for this reason also, to order that the appellants deliver possession of the boat to the trustee, or in any other respect interfere with or disturb the state Court's custody of it. The record shows clearly that the boat is *in custodia legis* of the state Court. (R. 2, 3, 7 to 14, 23, 24, 30, 31.) The record also shows that on the 19th day of June, 1928, Morgan filed his voluntary petition in bankruptcy, and that on the basis of it, he was adjudged bankrupt the same day. (R. 3, 30.) Six days *previously* to the filing of the petition and the making of the adjudication in bankruptcy, the state Court by its officer, the sheriff of the City and County of San Francisco acquired custody and possession of the boat, upon a levy of a writ of execution issued out of and by the Court on a judgment rendered and entered therein in the action there pending and entitled "Joseph Pulin, plaintiff v. Louis Morgan, defendant." (R. 30.) *Therefore the boat never went into the custody actual or constructive of the bankruptcy Court,* it not being in the custody, possession or control of the bankrupt when he filed his petition, nor when he was adjudged bankrupt.

Liberty Nat. Bank v. Bear, 265 U. S. 365, 368 to 371; 44 S. C. Rep. 499, 500, 501;

Taubel v. Fox, 264 U. S. 426, 430 to 434, 438; 44 S. C. Rep. 396, 398, 399, 401.

The referee expressly concedes that when Morgan's petition in bankruptcy was filed and when he was adjudged a bankrupt, the boat was in possession of the state Court. (R. 34.)

It is true that subsequently to the adjudication in bankruptcy the sheriff released the levy, ostensibly because of it, but he had no right to do so and acted in excess of his authority. However the fact remains that as the boat did not go into the custody or possession, either actual or constructive, of the bankruptcy Court at the time of the filing of Morgan's petition, nor at the time of the adjudication; *it not being then in the possession or custody of the bankrupt*, it never went into the Court's custody or possession by virtue of the bankruptcy jurisdiction, however much the trustee might have the right thereafter to bring plenary suit in the state Court to recover it as being property of the bankrupt, and thereby if successful bring it into his custody as trustee for administration in the bankruptcy proceedings. For would it be legally possible for the boat to go into the custody of the bankruptcy Court, it being *partnership* property.

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4. **SUMMARY PROCEEDINGS VOID.**

Clearly there could be no valid *summary proceedings* before the referee in bankruptcy to get possession of the boat as against the adverse claim of Pearson that it was partnership property and as such

not subject to the bankruptcy jurisdiction restricted as it is, to Morgan individually. A plenary suit by the trustee and brought by him in the state Court, would be necessary to get possession of the boat. (Bankruptcy Act, Sec. 23.) This is the well settled law on the point:

Harrison v. Chamberlin, 271 U. S. 191, 193;
Taubel v. Fox, 264 U. S. 426, 430 to 434, 438; 44 S. C. Rep. 396, 398, 399, 401;
Babbitt v. Dutcher, 216 U. S. 102, 105, 113;
Bardes v. Hawarden Bank, 178 U. S. 524, 532, 537, 538;
Mitchell v. McClure, 178 U. S. 539;
Louisville Trust Co. v. Cominger, 184 U. S. 18;
Jaquith v. Rowley, 188 U. S. 620;
First Nat. Bank v. Chicago T. & T. Co., 198 U. S., 280, 289;
Galbraith v. Vallely, 256 U. S. 46, 49, 50;
May v. Henderson, 268 U. S. 111, 115;
Eyster v. Gaff, 91 U. S. 525, 526;
In re Berland, 8 F. (2d) 724;
Redmon v. Vitt, 9 F. (2d) 36, 37;
Matter of Kumey, 289 F. 242, 244;
Copeland v. Martin, 182 F. 805;
In re Bertenshaw, 157 F. 363, 367 to 373;
In re Wells, 114 F. 222;
Tennyson v. Beggs, 176 Cal. 255, 258;
Fidelity S. & L. Assn. v. Citizen's T. & S. Bank, 186 Cal. 689, 692, 696;
4 Cal. Jur., Sec. 20, p. 69;
Spears v. Frenchton & B. R. Co., 213 F. 784, 786;

Shea v. Lewis, 200 F. 877;
In re Baird, 116 F. 765;
In re N. Y. Car Wheel Wks., 132 F. 203;
Cooney v. Collins, 176 F. 189, 192, 193.

Nor is it alleged in the petition of the trustee (R. 2, 3, 4), nor decided by the referee, that appellant Pearson's adverse claim respecting the boat being partnership property, is merely colorable; and therefore the law requires that the claim be held real, substantial, *bona fide* and not simply colorable.

Matter of Scherber, 131 F. 121;
Spears v. Frenchton & B. R. Co., 213 F. 784, 786;
Remington on Bankruptcy, (3d Ed.), Sec. 2438, at pages 582, 585.

Being such, there can be no valid summary proceedings respecting it, as held by the many authorities above cited.

Say the Supreme Court:

> "It is well settled that property or money held adversely to the bankrupt can only be recovered in a plenary suit and not by a summary proceeding in a bankruptcy court."

May v. Henderson, 268 U. S. 111, 115; 45 S. C. Rep. 456, 458;
Harrison v. Chamberlin, 271 U. S. 191, 193.

It results that the summary proceedings before the referee, and his order requiring appellants to deliver possession of the boat to the trustee, are void for want of jurisdiction. The plainly erroneous view of the referee as stated at page 36 of the record that the

"right to plenary suit exists only where the adverse claimant was in possession before the bankruptcy and remains in possession," is conclusively answered and refuted by the authorities above cited, holding that if his possession, no matter when acquired, is based upon a *bona fide, real and substantial and not merely colorable claim of right,* adversely to the bankrupt, he, the claimant, cannot be dispossessed in summary proceedings, if at the time of the filing of the petition in bankruptcy and at the time of the adjudication, the property was not in the possession of the bankrupt and therefore not in the constructive custody of the bankruptcy Court, or if as in the instant case, the property *as partnership property* could not be in the constructive custody of the Court. Nor is all property in the bankrupt's possession at the time of the filing of his petition in bankruptcy, subject to the jurisdiction of the bankruptcy Court, irrespective of whether the property belongs to and is owned by the bankrupt or not. The jurisdiction is statutory and special and restricted to the property of the bankrupt and extends no farther.

The question of title as against the bankrupt must be determined by the state Court in a plenary suit by the trustee, if the property is in the possession of an adverse claimant who asserts a legal right to it, not merely colorable, but one that is real and substantial and *bona fide,* especially in a case where the property has never come into possession, actual or constructive, of the bankruptcy Court. It could not come into such possession of the Court if it was not in the bankrupt's possession at the time he filed his petition,

nor at the time he was adjudged bankrupt, but was then in *custodia legis* of the State Court, on levy of its writ of execution. (*Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371), nor if it is partnership property. It would make no difference that *afterwards* the bankrupt obtained possession of the property. If he did his possession would only be that of a copartner. This would not give the bankruptcy Court a constructive possession of the partnership property, and therein lies the fallacy of the contention of the referee (R. 37), that on release of the boat by the sheriff at a time subsequent to the adjudication in bankruptcy, the property at once went into the constructive custody of the bankruptcy Court, by operation of law. It did not and could not, as it was not in the bankrupt's possession when he filed his petition for the adjudication nor when the adjudication was made. *Nor is it possible to perceive how partnership property the statute plainly says is not subject to the bankruptcy Court's jurisdiction, can go into its custody by virtue of that jurisdiction.* The question whether it is partnership property, is not a *federal* question, but is one strictly for the State Court to determine in a plenary suit by the trustee, where the property is in possession of the adverse claimant, who as a solvent partner is asserting his legal right to retain its possession as against the bankruptcy proceedings of his insolvent copartner. *The solvent partner cannot lawfully be required to surrender his possession to the trustee, before it has been judicially determined by a Court of competent jurisdiction, that the property is not partnership property.* To deprive him of the possession by

order of a referee in summary proceedings, and at the same time do so without any decision that the property belongs to the bankrupt in severalty and is not partnership property, is clearly to deprive the adverse claimant of his legal right to the property, without "due process of law," and in violation of the Fifth Amendment of the Constitution.

Marshall v. Knox, 16 Wall. 551, 555, 556, 557;
Smith v. Mason, 14 Wall. 419, 431, 433;
Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401;
Stuparich v. Superior Court, 123 Cal. 290, 292.

Of course the referee would have no jurisdiction to determine whether the property is partnership property or not, (*Spears v. Frenchton etc. R. R. Co.,* 215 F. 784, 786; *Shea v. Lewis,* 200 F. 877; *In re Baird,* 116 F. 765; *In re Wells,* 114 F. 222; *Remington on Bankruptcy,* 3d ed., sec. 2437), and has not attempted to do so, but on the contrary has properly refused to pass upon the matter. (R. 32, 33.) His basic error is in the palpably untenable notion that the bankruptcy jurisdiction extends to all property simply because it is claimed by either the bankrupt or the trustee, and irrespective of whether it is the bankrupt's individual property or not or belongs to a partnership, and irrespective of whether it was in the possession of the bankrupt either at the time he filed his voluntary petition in bankruptcy, or at the time of the adjudication based upon it. In this the referee's view of the law (R. 32, 33), he is clearly in error.

Eyster v. Gaff, 91 U. S. 525, 526;

Bardes v. Hawarden Bank, 178 U. S. 524, 537, 538,

and the many other authorities herein cited.

In his report (R. 29, 30), the referee refers to the fact that the bankrupt has scheduled an "interest" in the boat, (not specifying the nature or extent or value of the interest, but only the alleged value of the boat), and the referee refers to this as a material fact on which he bases his order; but it is clearly of no importance whatever and not in the slightest degree relevant here, as rightly held in *Eames v. Philpot,* 72 Cal. App. 158.

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5. THE CUSTODIA LEGIS OF THE STATE COURT IN THE ACTION OF CLAIM AND DELIVERY.

After the release of the boat by the sheriff, and subsequent to the adjudication in bankruptcy, the bankrupt Morgan took possession of it, whereupon the appellant Pearson as solvent partner brought an action in the state Court in claim and delivery, against Morgan, to recover the property. Pending the action, the state Court by its officer, the sheriff, seized the boat and held it in temporary custody under the provisions of sections 509, 510, 511 and 512 of the Code of Civil Procedure of California (R. 2, 3, 7, to 12, 23, 24); thereafter and pursuant to section 514 of said Code, expressly providing that the defendant in the action may require the return of the property to him, pending the trial of the case,

> "by giving the sheriff a written undertaking, executed by two or more sufficient sureties to the

> effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for payment to him of such sum as may, for any cause, be recovered against the defendant. If a return of the property be not so required within five days after the taking and service of notice to the defendant, it must be delivered to the plaintiff,"

the sheriff rightly and on the expiration of the five days, there being no reclamation bond by the defendant, delivered the property to the plaintiff, the appellant Pearson, who still holds it in his possession *pendente lite.* Contrary to the clearly erroneous views of the referee on the point (R. 17, 18), such possession by Pearson is the custody and possession of the state Court, and is held to be a possession *in custodia legis,* and one the Court is expressly required to protect from interference, the statute expressly providing that

> "after the property has been delivered to the plaintiff as in this chapter provided, the Court shall, by appropriate order, protect the plaintiff in possession of said property until the final determination of the action."
>
> Cal. Code Civ. Proc., Sec. 521.

The action is still pending and awaiting trial in due course. That the possession of the boat by Pearson is the possession of the State Court and constitutes a *custodia legis*, in the State Court, is distinctly held in:

Hagan v. Lewis, 10 Pet. 400;
Hawi M. & P. Co. v. Leland, 56 Cal. App. 224;
Bisconer v. Billing, 71 Cal. App. 779.

This absolutely valid *custodia legis* of the state Court, of course, precludes all interference with it by the bankruptcy Court.

Palmer v. Texas, 212 U. S. 118.

And while it is perfectly true, as held in *White v. Schloerb,* 178 U. S. 542, the property could not be taken from the custody of the bankruptcy Court by writ of replevin issuing out of the state Court, *we have no such case here,* as the boat in the instant case was not in the custody, either actual or constructive, of the bankruptcy Court at the time of the filing of Morgan's voluntary petition in bankruptcy, nor at the time of the adjudication based on the petition, but was then, as sufficiently hereinbefore shown, in custody of the state Court upon its writ of execution in the case of *Pulin v. Morgan.* But it is in any event conclusive that the boat as partnership property, could not be in the custody of the bankruptcy Court on the individual petition of Morgan, restricted as it is to him and not embracing nor extending to the partnership. In such a case, jurisdiction over the boat as partnership property is prohibited by the concluding clause in section five of the Bankruptcy Act of 1898.

In re Mercur, 122 F. 384;

In re Bertenshaw, 157 F. 363, 367 to 373;

Williams v. Lane, 158 Cal. 39, 43 to 45;

Remington on Bankruptcy, (3d Ed.) Secs. 2906, 2909, 2910;

7 Corpus Juris., 132;

4 Cal. Jur., Sec. 20, page 69.

There is nothing to the contrary in *White v. Schloerb,* 178 U. S. 542, as explained in *Metcalf v. Barker,* 187 U. S. 165, 176, and *Hinds v. Moore,* 134 F. 221, 223, 224.

And of course and in conflict with the erroneous views of the referee on the point (R. 34), the decision and judgment of the state Court in the action of claim and delivery, that the boat is partnership property, will be *res judicata* on the bankruptcy Court; it is so held in:

> Herman v. Cullerton, 13 F. (2d) 754, 755, 756;
> Lion B. & S. Co. v. Karatz, 262 U. S. 77;
> Shields v. Coleman, 157 U. S. 168.

It is undoubtedly the law that the boat being *in custodia legis* of the state Court in the action of claim and delivery, and never having been in the possession or custody, actual or constructive, of the bankruptcy Court, it not having been in the bankrupt's possession when he filed his voluntary and individual petition in bankruptcy, nor when on the same day he was adjudged a bankrupt, the referee's order is void; and it being clear from the statute that the boat as partnership property is excluded from the jurisdiction of the bankruptcy Court and its referee, the order of the latter in the summary proceedings before him, attempting to take the boat from the custody of the state Court and deliver it to the trustee in bankruptcy and in a case where the jurisdiction to determine whether the boat is partnership property is exclusively in the state Court, and where its decision and judgment that the boat is partnership property will be

res judicata on the bankruptcy Court, is plainly a violation of the state Court's competent jurisdiction in the case and for that reason unlawful. It is not the law that the bankruptcy Court has exclusive jurisdiction to determine whether the boat is partnership property or not, and the views of the referee to the contrary, (R. 33, 34), are clearly erroneous. The jurisdiction to determine the question is exclusively in the state Court and not in the bankruptcy Court. This is held to be the well settled law upon the point by the many authorities we have herein cited under Section 23 of the Bankruptcy Act of 1898. As said by the Supreme Court in *Lion B. & S. Co. v. Karatz,* 262 U. S. 77, "lower federal Courts are not superior to the state Courts." And again we point out that to require the appellants to deliver possession of the boat to the trustee in bankruptcy, before any judicial determination is made that the boat is the individual property of the bankrupt Morgan, with title in him in severalty, and not partnership property, is clearly to deny them the "due process of law" guaranteed by the Fifth Amendment of the Constitution, which applies as much to the possession of property as it does to its title, as held in *Marshall v. Knox,* 16 Wall. 551, 557, and *Havemeyer v. Superior Court,* 84 Cal. 327, 396, 397, 400, 401.

It is plainly a violation of the constitutional right to "due process of law," to take from a man the possession of property to which he is entitled and without a hearing or opportunity to be heard, nor any decision respecting his legal right to its possession,

compel him to bring action for its recovery, or otherwise establish his legal right to the property.

It is so held in:

> Marshall v. Knox, 16 Wall. 551, 557;
> Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401.

Possession is what gives at least some value to the title, and to deprive him of the possession is to deprive him of the property and when done or attempted as in the instant case, without first giving him his "day in court" as to his legal right to retain the possession, is to deny him the constitutional guaranty of "due process of law."

> Smith v. Mason, 14 Wall. 419, 431, 433;
> Marshall v. Knox, 16 Wall. 551, 555, 556, 557;
> Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401;
> Stuparich v. Superior Court, 123 Cal. 290, 292;
> Thompson v. Superior Court, 119 Cal. 538, 543, 544.

In the referee's report it is expressly conceded that there is no jurisdiction in the bankruptcy court to order delivery of the boat to the appellee as trustee, *if it is partnership property* (R. 18, 19, 33, 37); and yet without any hearing or decision as to whether the boat is partnership property or not, the referee orders the appellant Pearson, who as solvent partner, has the legal right to its possession as partnership property, to deliver it to the trustee in bankruptcy, on the *assumed* but not adjudged theory that it is the property of the bankrupt and not the property of the part-

nership. Clearly no such order is valid until it is first decided by a Court of competent jurisdiction that the boat is not partnership property, and is the property of the bankrupt individually. And clearly too the referee is in error in ruling that the boat was in the constructive custody and possession of the bankruptcy Court, when as clearly shown by the record (R. 30, 34), it was in the custody and possession of the state Court by virtue of the levy of its writ of execution in the case of *Pulin v. Morgan,* at the very time that Morgan filed his petition in bankruptcy and at the very time he was adjudged a bankrupt. As a matter of well settled law the bankruptcy Court could not *thereafter* get actual or constructive possession of the boat upon the release of the levy the sheriff had made, as the Court's jurisdiction is not only limited to the benkrupt's individual property, but the constructive custody and possession of it as resulting from the filing of the petition, is also limited to the property then in the bankrupt's actual possession, and does not extend to property that subsequently to the adjudication comes into his possession, especially when such possession is that of a partner and not individually, and the petition in bankruptcy is his individual petition and does not extend to the partnership nor to the partnership property. We are not contending that the mere assertion the property is partnership property, is sufficient to exclude the jurisdiction of the bankruptcy Court, but the point we make is that the adverse claim to it as partnership property, coupled with its possession, is sufficient to prevent summary proceedings against it

in the bankruptcy Court, and entitled the claimant to retain the possession as against the trustee and the bankruptcy jurisdiction, until in a plenary suit in the state Court it is finally adjudged that the property is not partnership property, but is the individual property of the bankrupt. The authorities herein cited fully sustain this contention, and it certainly is conclusive against the plainly untenable theory of the referee that when subsequently to the adjudication in bankruptcy, Morgan obtained possession of the boat, such possession became the possession and the constructive custody of the bankruptcy Court. It certainly did not, and for the obvious reason that the boat was not in Morgan's possession when he filed the petition in bankruptcy nor when he was adjudged a bankrupt, but was in *custodia legis* in the state Court; and the fact that afterwards the boat came into the possession of Morgan would not put it into the possession nor in the constructive custody of the bankruptcy Court as against the adverse claim of the appellant Pearson that it is partnership property and therefore not subject to the Court's jurisdiction in the bankruptcy proceedings restricted as they are to Morgan individually. The theory of the referee that immediately on the boat being released from the levy of the writ of execution issuing out of the state Court, it at once and by operation of law went into the constructive custody of the bankruptcy Court (R. 18, 32, 33, 37), is clearly an impossible one, not only because the boat was not in the bankrupt's possession when he filed his voluntary petition in bankruptcy, nor when he was adjudged a bankrupt, but being

partnership property and adversely claimed as such by the appellant Pearson, it could not and did not go into the constructive possession of the bankruptcy Court, and therefore and according to the authorities we have cited, the *summary proceedings* before the referee are clearly void. In addition, we cite as sustaining our contention:

Boyle v. Gray, 28 F. (2d) 7, 15, 16;
In re Macklem, 28 F. (2d) 417, 419.

The precise question presented in this respect is not whether an adjudication adverse to the claim that the boat is partnership property, can be made by the bankruptcy Court or its referee in summary proceedings, for no such adjudication has been made or attempted, but it is whether the Court in summary proceedings and without deciding whether the boat is partnership property or not, can order its delivery to the trustee, by the solvent partner who is making a substantial and *bona fide* claim, adverse to the trustee that the boat is partnership property and therefore excluded by the concluding clause in Section 5 of the Bankruptcy Act, from the Court's jurisdiction. Of course the Court can have no lawful custody or possession either actual or constructive of the boat if it is partnership property—a conclusive point expressly conceded by the referee (R. 18, 33, 37). So that the case in this particular must and does depend on the judicial determination by a Court of competent jurisdiction, of the dominant and paramount question whether the boat is partnership property.

According to the authorities we have herein cited on the point, the only Court of competent jurisdiction to decide the question is the state Court in a plenary suit and the decision will be *res judicata* on the bankruptcy Court. As the bankruptcy statute in the concluding clause of Section 5 denies the latter Court all jurisdiction of the boat if it is partnership property, and as the Court can have no possession actual or constructive of the boat in such a case, it can have no jurisdiction in summary proceedings to determine the question, unless of course the claim that the boat is partnership property is shown to be merely colorable and not substantial or *bona fide*, neither of which conditions exists in the instant case. It is neither alleged in the petition of the trustee for the order directing the delivery of the boat to him, nor does the referee find or decide that the claim is merely colorable. Therefore the law deems the claim to be real, substantial, *bona fide* and not merely colorable.

> Matter of Scherber, 131 F. 121;
> Spears v. Frenchton & B. R. Co., 213 F. 784, 786;
> Remington on Bankruptcy, (3d Ed.), Sec. 2438, at pages 582, 585.

Therefore the Court in bankruptcy has no jurisdiction in a summary proceeding to decide the controversy as to whether the boat is partnership property, and has not attempted to do so in the instant case. The basic theory advanced by the referee, that the boat was in the constructive custody

of the bankruptcy Court is entirely unfounded, not only because at the time of the filing of Morgan's petition in bankruptcy and when the adjudication in bankruptcy was made, the boat was then actually in the *custodia legis* of the State Court by its sheriff under levy of its writ of execution in *Pulin v. Morgan,* but the boat as partnership property could not by any legal possibility be in the constructive possession of the bankruptcy Court in the Morgan bankruptcy case. Therefore the boat could not be judicially before the Court, nor in its custody as a basis for the exercise of a jurisdiction to determine whether it is partnership property or not, and the matter could not be there litigated, especially as the Bankruptcy Act has given exclusive jurisdiction over the controversy to the state Courts in a plenary suit. The referee's assumed "paramount jurisdiction of the bankruptcy Court," to determine the question (R. 33, 34, 37) does not and never did exist, where the claim that the property is partnership property is not merely colorable, but as here, is real, substantial and *bona fide*.

IV.

CONCLUSION.

It is respectfully submitted that for the reasons in this brief given and upon the authorities cited, the order and decree appealed from should be reversed with direction to the District Court to annul the

order of the referee for delivery of the boat to the trustee.

Dated, San Francisco,
May 25, 1929.

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No. 5736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY, *Appellants,* vs. A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt), *Appellee.*	}

REPLY BRIEF FOR APPELLANTS.

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A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt),
Appellee.

REPLY BRIEF FOR APPELLANTS.

I.

CONCLUSIVE POINTS NOT ANSWERED IN BRIEF OF APPELLEE.

Surely no one can reasonably contend that the brief of the appellee furnishes in law or in fact even a semblance of an answer to any one of the many conclusive points urged in the brief for appellants, nor that the appellee has cited even one authority having as much as the remotest application favorable to him in the case presented by the record on this appeal. The following determinative points urged in appellants' brief and there sustained by principle and authority, are left entirely unanswered by the appellee, viz.: (1) That the property in con-

troversy is shown by the record to be partnership property, and this by reason of the absence of any traverse or denial of the averments in the sworn plea to the jurisdiction and in the sworn petition for review, showing the fact that it is partnership property. This conclusive point in the case is presented and the authorities clearly sustaining it are cited in the brief for appellants at pages 9 and 10. (2) That the bankruptcy court is denied jurisdiction of partnership property in the case of a voluntary petition of but one of the partners individually, *the case here.* This conclusive point is presented and the authorities clearly sustaining it are cited in the brief for appellants at pages 10 and 20. Having no jurisdiction of partnership property, the order for its delivery to the trustee in bankruptcy of the individual partner, is clearly void. (3) The property in controversy being partnership property, and as such not subject to the jurisdiction of the bankruptcy court, the jurisdiction of the State Court in the claim and delivery action *and its custodia legis of the property only as partnership property,* during the pendency of the action, is paramount, supreme and exclusive. (4) That even if this were not the law, as the property is actually in the *custodia legis* of the State Court in the claim and delivery action, distinctly so held by the authorities cited at page 19 of appellants' brief, and was in such custody at the time of the filing of the trustee's petition in the summary proceedings before the referee for possession of the property, there was no right in the bankruptcy court to take possession of the property, even if it were not partnership prop-

erty, until the trustee had first made application to the State Court for the possession, and the application had been denied. The point is presented at pages 2 and 3 of appellants' brief. (5) The property being in the custody of the State Court at the time Morgan filed his voluntary petition in bankruptcy, and at the time he was adjudged bankrupt, such *custodia legis* resulting from the levy of the execution in *Pulin v. Morgan,* the doctrine of caveat, attachment and injunction by implication or operation of law incidental to the petition and adjudication in bankruptcy, and referred to in *International Bank v. Sherman,* 101 U. S. 407 and *Muller v. Nugent,* 184 U. S. 10, can have no application, for as held by the Supreme Court,

> "since the possession of the sheriff was the possession of the state court, the trustee's claim to the property would, under general principles of law, have to be litigated in the state court. * * * In this case the sheriff had, before the filing of the petition in bankruptcy, taken exclusive possession of the property, and he had retained such possession and control after adjudication and the appointment of the trustee. The bankruptcy court therefore, did not have actual possession of the res. The adverse claim of the judgment creditor was a substantial one. The bankruptcy court, therefore, did not have constructive possession of the res. Neither the judgment creditor or the sheriff had become a party to the bankruptcy proceedings. There was no consent to the adjudication by the bankruptcy court of the adverse claim. The objection to the jurisdiction was seasonably made and was insisted upon throughout. The bankruptcy court therefore, did not acquire jurisdiction over the controversy in summary proceedings. Nor did it otherwise."

Taubel v. Fox, 264 U. S. 426, 430, 437, 438.

Of course it would be immaterial that in the case cited, the sheriff retained possession until after the appointment of a trustee, for the decisive point is that he as sheriff of the State Court had the possession at the time of the filing of the petition in bankruptcy and at the time of the adjudication. This custody by the State Court prevented the bankruptcy court from having the necessary jurisdictional possession, to wit: constructive possession of the property, for as held in *Bailey v. Baker Ice Machine Co.*, 239 U. S. 268, 275, 276, it is the time of the filing of the petition in bankruptcy that the law has fixed "as the line of cleavage," relative to the jurisdictional possession, actual and constructive, of property claimed by the bankrupt or his trustee. To the same effect see *Taubel v. Fox,* 264 U. S. 432, 433, and *Bank v. Sherman,* 101 U. S. 403, 406. (6) The failure to allege in the trustee's petition in the summary proceedings before the referee, that the adverse claim of the appellant Pearson to the boat as partnership property, is *merely colorable,* requires as a matter of law that it be held that it is not merely colorable but is real, substantial and *bona fide,* and therefore can only be litigated in a plenary suit in the State Court. The point is presented and the authorities cited at pages 14 and 27 of appellants' brief. It is held by the authorities cited at pages 13 and 14 of the brief, that in such a case the bankruptcy court and its referee have no jurisdiction in summary proceedings to order the adverse claimant to deliver possession of the property to the trustee, and it is held by the same authorities that the jurisdiction to determine the ques-

tion of title is exclusively in a plenary suit in the State Court, under section 23 of the Bankruptcy Act, and the judgment of the State Court will be *res judicata* on the bankruptcy court, as held by the authorities cited at page 21 of appellants' brief.

(7) It is held to be and undoubtedly is a violation of the "due process of law" clause in the Fifth Amendment of the Constitution of the United States to order in summary proceedings that appellants surrender possession of the boat to the trustee, without allegation, proof or decision or adjudication or other judicial determination that the boat is not partnership property of the bankrupt and appellant Pearson, or that the adverse claim of Pearson to it and to its possession as partnership property is merely colorable and not real, substantial and *bona fide.* The point is presented and the authorities fully sustaining it are cited in appellants' brief, pages 17, 22 and 23. *Clearly, and according to the authorities cited at pages 13 and 14 of appellants' opening brief, there can be no jurisdiction in the bankruptcy court, or its referee, to order delivery of possession of the boat to the trustee, without first determining whether the adverse claim of appellant Pearson to the boat as partnership property is merely colorable and not real, substantial and bona fide.* And this the bankruptcy court has not done in the instant case; nor can it do so until it has at least a constructive possession of the boat. It is not necessary that it have actual possession for the purpose. It cannot have the requisite constructive possession if the boat is partnership property, nor if it was not in actual possession of the bankrupt at the time of

the filing of his petition or when the adjudication was made, but was then in a valid *custodia legis* of the State Court, as shown by the record (R. 30, 34), nor if the adverse claim to the boat as partnership property, is *as conceded in the record,* and as held by the authorities cited at pages 14 and 27 of appellants' opening brief, a real, substantial and *bona fide* claim and not merely colorable.

Taubel v. Fox, 264 U. S. 426, 437, 438.

Not one of the foregoing specified seven determinative and conclusive points in the case is answered in the brief of the appellee by any contention there made, nor by any authority there cited, nor do the counsel for the appellee make the least attempt to furnish an answer to any one of the points. This no doubt because the points are decisive of the case and unanswerable.

II.

POINTS URGED BY APPELLEE ARE DESTITUTE OF MERIT.

Now as to the points and the authorities cited in the brief for the appellee: (1) It is there contended that the action in claim and delivery, filed in the State Court by appellant Pearson, is an illegal interference with the jurisdiction of the bankruptcy court and comes within the doctrine of the *Schloerb* case in 3 Am. B. R. 224 and 178 U. S. 542, 546, 547. We have cited that case at pages 20 and 21 of appellants' opening brief and there stated the reasons why it is not in point, principally in that the boat

in the instant case was never in the possession, actual or constructive of the bankruptcy court or its referee, and that *as partnership property,* such possession is prohibited by subdivision *h* of section 5 of the Bankruptcy Act of 1898 as construed by the authorities cited at pages 10 and 20 of appellants' brief. It results that the action in claim and delivery in the State Court, affirmatively showing as it does that it is jurisdictionally and exclusively confined to and based on the fact that the boat *is partnership property* (R. 8, 9, 10), is not an invasion of, nor interference with the jurisdiction of the bankruptcy court respecting the individual property of the bankrupt Morgan, the jurisdiction in bankruptcy in his case, confessedly not extending to nor embracing within its authority the partnership property. *As to the partnership property, the jurisdiction of the State Court is clearly exclusive, paramount and supreme, no matter from what angle the case is viewed.* Not only is there no jurisdiction in the bankruptcy court, of the boat *as partnership property,* but the Court did not have either the actual or constructive possession of the boat at the time the Morgan petition in bankruptcy was filed and he individually, but not the partnership, adjudged bankrupt, such being the very point of time made necessary to the bankruptcy court's jurisdiction as the "line of cleavage" referred to in *Bailey v. Baker Ice Machine Co.,* 239 U. S. 268, 275, 276; *Acme Harvester Co. v. Beckman Lumber Co.,* 222 U. S. 300, 307, in matters of jurisdiction, for the boat was then in the valid custody of the State Court under its writ of execution in *Pulin v. Morgan* (R. 30, 34),

and therefore did not when subsequently taken into his possession by Morgan *as a copartner of Pearson,* nor even were Morgan's possession an individual one, go into the constructive possession of the bankruptcy court, for the scope and extent of its constructive custody is limited to the time of the filing of the petition, or at most, to the time of the adjudication. It follows that as a matter of well settled law, the three questions stated at pages 3 and 4 of the appellee's brief must be answered in the negative. It is not true that the question before the Court in the *Schloerb* case was whether "a plaintiff in replevin is entitled to hold the property seized by the sheriff as against the trustee in bankruptcy, where the action in replevin was instituted after the adjudication in bankruptcy," but the question and only question was whether property of the bankrupt in his possession at the time the petition in bankruptcy was filed and adjudication made, and thereupon taken into the actual possession of the bankruptcy court and its referee, can be taken on a writ of replevin from the State Court. The question is so stated by the Supreme Court at pages 546 and 547 of 184 U. S., in the SCHLOERB CASE. *Such is not the instant case,* and this is true whether the boat is partnership property or the individual property of the bankrupt, since it was admittedly in the valid custody of the State Court when Morgan's petition was filed and he adjudicated a bankrupt. *This is the time constituting the line of cleavage in matters of bankruptcy jurisdiction.* Therefore the subsequent release of the boat from the State Court's custody, under its execution in *Pulin v. Mor-*

gan, could not and did not place it in the constructive custody of the bankruptcy court, especially it being partnership property. In the *Schloerb* case, the Supreme Court stresses the point that the property there involved was in the actual possession of the bankrupt as his property at the time of the filing of the petition and at the time of the adjudication, (the line of jurisdictional cleavage), and was actually taken into possession by the bankruptcy court and its referee, which admittedly is not the case here, respecting the boat in controversy. Nor is it the case here that the boat was attached between the time of the filing of Morgan's petition in bankruptcy and the time of the adjudication as erroneously though impliedly asserted at lines 25 and following on page 6 of the appellee's brief. On the contrary, the record shows clearly that the boat was taken into the custody of the State Court under its writ of execution in *Pulin v. Morgan,* more than six days *prior* to the filing of the petition in bankruptcy and was in the State Court's valid custody at the time the petition was filed and the adjudication made. (R. 30, 34.) And as held in *Taubel v. Fox,* 264 U. S. 426, 430, 438, and *Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371, the adjudication in bankruptcy did not disturb the State Court's custody of the boat, nor give to the bankruptcy court the necessary constructive custody as of the time its jurisdiction vested, to wit: the date of the filing of Morgan's petition and of the adjudication, which were on the same day. (R. 30.) There is a rather enigmatical reference at lines 23 and following, of page 7 of the appellee's brief, about dis-

solving a partnership by an action in replevin. Such is not the case. The partnership was dissolved by the bankruptcy of Morgan, (Civil Code Cal., sec. 2450, subd. 4; Parsons on Partnership, 4th ed., secs. 304, 366, 367, 368, 369; 30 Cyc., 654, 655; 20 Cal. Jur., 800.) Necessarily the solvent partner is entitled to the possession of the partnership property for purpose of liquidation, not only under section 2459 of the Civil Code of California, but by authority of subdivision *h* of section 5 of the Bankruptcy Act of 1918. (20 Cal. Jur. 807; *Williams v. Lane,* 158 Cal. 39, 44.) The solvent partner has not only a greater right than any other person claiming title as against the trustee in bankruptcy, but by the final clause in section 5 of the Bankruptcy Act of 1898, as construed by the authorities cited at pages 10 and 20 of appellants' brief, the bankruptcy court has no jurisdiction of partnership property on a petition by and adjudication against an individual partner. None of the cases cited in the brief of the appellee hold that the *trial* of title to property found in the possession of the bankrupt "during the interim between the filing of the petition and the election of a trustee must be had in the bankruptcy court," but on the contrary they hold that the jurisdictional line of cleavage is at utmost the date of the adjudication (*Everett v. Judson,* 228 U. S. 474, 479; *Lazarus v. Prentice,* 234 U. S. 263, 266, 267; *Bailey v. Baker Ice Machine Co.,* 239 U. S. 268.) And the many authorities cited at pages 13 and 14 of appellants' brief hold that under section 23 of the Bankruptcy Act of 1898, the bankruptcy court has no jurisdiction to hold *trial* of an adverse

claim of title, not merely colorable, but substantial, real and *bona fide,* and that the trial jurisdiction in such a case is exclusively in the State Court and in a plenary suit. To the same effect is *Mueller v. Nugent,* 184 U. S. 1, 15, 16, and *Louisville Trust Co. v. Cominger,* 184 U. S. 24, 25, 26. The contention of counsel for appellee to the contrary of the ruling in these cases, is also in conflict with all the many authorities on the point. The case of *Lazarus v. Prentice,* 234 U. S. 263, 266, 267, cited at page 8 of their brief, does not in the slightest degree tend to sustain their plainly erroneous views on the subject.

(2) It is a conclusive answer to appellee's contention respecting the *custodia legis* of the State Court, that the latter originated six days *prior* to the filing of the Morgan petition in the seizure of the boat on execution. (R. 30, 34.) And the subsequent *custodia legis* of the State Court in the claim and delivery action is based entirely and expressly and exclusively *upon the jurisdictional fact that the boat is partnership property* (R. 8, 9), and as such excluded by section 5, subd. *h* of the Bankruptcy Act of 1898, from the jurisdiction of the bankruptcy court in the case of Morgan. This answers conclusively the first proposition of the argument put forth by appellee's counsel at page 9 of their brief. *The boat never was in the actual or constructive custody of the bankruptcy court, and therefore could not and was not taken from its custody at any time.* Therefore the entire case of the appellee fails at its very foundation, its basis being the utterly unsustainable one, that the boat was taken from the constructive custody

of the bankruptcy court by the action in claim and delivery and therefore under the ruling in *White v. Schloerb,* 178 U. S. 542, can be ordered returned or delivered to the trustee, regardless of any adverse claim of title to it. *Such is not the case here, on the facts or the law.*

(3) In answer to the appellee's point that *after the adjudication* in bankruptcy and because of it, the sheriff released his execution levy on the boat and that then the bankrupt took possession of it, we insist that this is immaterial in the decision of the questions presented by appellants, as it concedes the undisputed fact that at the time the petition was filed and adjudication made, the boat was not and could not be in the constructive custody of the bankruptcy court, and this for two conclusive reasons, to wit: it was then in the valid *custodia legis* of the State Court, as admitted by the referee (R. 34), under its writ of execution in *Pulin v. Morgan,* and in any event it being partnership property, the Bankruptcy Act denies the bankruptcy court custody and jurisdiction of the boat, as held by the authorities cited at pages 10 and 20 of appellants' brief. We again point out that by the omission of the trustee to file an answer denying the averments of the sworn plea to the jurisdiction and of the sworn petition for review, that the boat is partnership property, he is deemed to admit that it is. It is so held by the authorities cited at pages 9 and 10 of appellants' brief. The fact that after the sheriff had without authority in law, released the boat from the execution levy, solely because of the adjudication in bankruptcy and in violation of the law as construed

by the Supreme Court in *Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371, is manifestly immaterial and it is equally immaterial, that after the unauthorized release, Morgan took possession of the boat. He would then hold it, not for the trustee, nor for the bankruptcy court, but solely for the solvent partner, the appellant Pearson. It is not our contention that the bankruptcy court has not "paramount jurisdiction" of property of the bankrupt in his possession at the time of either the filing of the petition or at the time of the adjudication; but we do contend that the Court has no jurisdiction of partnership property on an adjudication restricted to an individual partner, and not including the partnership, and we do contend that the Court has no constructive custody of property not in the possession of the bankrupt at the time of the filing of the petition nor at the time of the adjudication, but then in a valid *custodia legis* of the State Court, although undoubtedly it has jurisdiction of all the property of the bankrupt not exempt from execution if owned by him at said time, but not of property acquired by him after the adjudication, nor of property not belonging to him. Of course the bankruptcy court would have jurisdiction of the boat if it were the individual property of Morgan, and on that theory if it had the requisite constructive or actual possession (*Taubel v. Fox*, 264 U. S. 426, 432, 433, 434), could in summary proceedings, competently adjudge whether an adverse claim of title to it is *merely colorable* and if held to be *not* merely colorable, but real, substantial and *bona fide,* the trustee would be required to bring a plenary

suit in the State Court to have determined the question of title, and to recover possession of the boat, if entitled to it, as held in *Mueller v. Nugent,* 184 Cal. 1, 15, 16 and in *Louisville Trust Co. v. Cominger,* 184 U. S. 18, 24, 25, 26 and by the many other authorities cited at pages 13 and 14 of appellants' opening brief. The *bankruptcy court* would have no jurisdiction to determine in such a case the question of title. As said by the Supreme Court:

> "But in no case where it lacked possession, could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding, the validity of a substantial adverse claim. In the absence of possession, there was under the Bankruptcy Act of 1898 as originally passed, no jurisdiction, without consent, to adjudicate the controversy even by a plenary suit."

And the Court proceeds and holds that no such jurisdiction exists under the Bankruptcy Act as it now stands, in cases such as the instant one.

Taubel v. Fox, 264 U. S. 433, 434.

Either the bankruptcy court has or it has not *constructive* custody of the boat in controversy in the instant case. If it has not such constructive possession, (it is conceded by the appellee that it never had actual or physical possession of the boat), there is no jurisdiction to determine in either summary proceedings or plenary suit before it the question of title, nor the one of Pearson's adverse claim, whether merely colorable or not. If it has constructive possession of the boat, then it has competent jurisdiction in summary proceedings to determine without having actual

or physical possession of it, whether Pearson's adverse claim is merely colorable, and if it is, to order him to deliver possession of the boat to the trustee; *but in no event would the bankruptcy court have competent jurisdiction to make the "turn over" order, until it had first legally determined on the basis of the essential and necessary constructive possession of the boat, that Pearson's adverse claim to it as partnership property, was merely colorable.* Therefore and according to the authorities we have cited at pages 13 and 14 of appellants' brief, the bankruptcy court and its referee would have *no jurisdiction* to do what was done in the instant case, to wit: make the "turn over" order in summary proceedings *without any allegation, proof or decision that Pearson's adverse claim to the boat is merely colorable.* Manifestly there is no jurisdiction in the bankruptcy court nor in its referee to make the "turn over" order as against the adverse claim of Pearson, solely for the purpose of getting actual and physical possession of the boat in a case where the Court had no constructive possession of it, so that the Court might *thereafter* and in summary proceedings based on such actual possession, determine whether the adverse claim is merely colorable or not. To take the boat from the adverse claimant in such circumstances *and without any prior allegation, proof or decision that Pearson's adverse claim to the boat as partnership property, is merely colorable,* is clearly a violation of the due process of law" clause of the Fifth Amendment of the Constitution of the United States, as held by the authorities cited at pages 17, 22 and 23

of appellants' brief. And to the same effect is the decision of the Supreme Court in *Louisville Trust Co. v. Cominger,* 184 U. S. 18, 25. It is certainly not the law that "the bankruptcy court has jurisdiction to determine all adverse claims to all property found in the possession of the bankrupt and that jurisdiction is by summary proceeding," unless of course the bankrupt had such possession at the time he filed his petition or at the time of the adjudication. And in no case would the Court have such jurisdiction any further than to determine whether the adverse claim is merely colorable, and in no case would the Court have jurisdiction to make a "turn over" order, until it had first adjudged that such is the character of the claim;—*a necessary jurisdictional prerequisite not existing in the instant case.* Therefore the "turn over" order in question here is void for want of jurisdiction, and should be so held. It will be found that all the authorities cited in appellants' brief are directly in point and fully sustain the various propositions of law and the relevancy of all the propositions of fact urged in support of the appeal and in support of the prayer for reversal of the order and decree appealed from. There is nothing to the contrary in any of the six or seven cases cited in the brief of the appellee. To the extent they are pertinent, they sustain our contention. It is true but irrelevant here that the same attorney who appeared for the judgment creditor in *Pulin v. Morgan,* and at a time prior to the filing of Morgan's petition in bankruptcy and since, is also one of the attorneys for the appellant Pearson the solvent partner of Morgan. Clearly there is nothing

inconsistent in this as Morgan's interest in the partnership was subject to the levy of the execution in *Pulin v. Morgan,* at the time the sheriff levied it, to wit: *prior* to the filing of the petition in bankruptcy. The partner's share is always subject to levy on execution prior to the filing of a petition in bankruptcy. (20 Cal. Jur. 858.) And when Morgan was adjudged bankrupt, the attorney for the judgment creditor had a perfect right to represent and act for the solvent partner in contesting by appropriate litigation in the State Court and by appropriate proceeding and plea before the referee and in the District Court, the void claim of Morgan's trustee to partnership property.

Of course in representing the judgment creditor prior to the adjudication in bankruptcy, the attorney was not representing the solvent partner and in representing the latter he was not also representing the judgment creditor. There is obviously no conflicting interests involved. The right of Morgan's judgment creditor is restricted to Morgan's individual interest in the partnership property, he not being a creditor of the partnership, and if he were a partnership creditor, his rights would be protected by the solvent part ner as required by law. The judgment creditor Pulin never did contend that the boat is the individual property of Morgan and not partnership property.

III.

CONCLUSION.

In conclusion, the "turn over" order of the referee is clearly void for want of jurisdiction, in the particulars we have sufficiently specified in this and the opening brief of appellants. The bankruptcy court, if it has actual or constructive possession of property alleged to be owned by the bankrupt individually, is given jurisdiction in summary proceedings to determine whether an adverse claim to the property as being partnership property, is merely colorable or not; but this jurisdiction is dependent on the Court having actual or constructive possession of the property either at the time of the filing of the petition or at the latest, at the time of the adjudication. This essential prerequisite to the Court's jurisdiction, does not exist if the property is then in a valid *custodia legis* of the State Court, as in the instant case. Afterwards it is not possible for the necessary jurisdictional possession to exist as a competent basis for summary proceedings in the bankruptcy court, but of course the trustee can bring and maintain a plenary suit in the State Court, pursuant to section 23 of the Bankruptcy Act, to enforce his right to the property, if he has any such right. These propositions are well settled law as held by the authorities cited at pages 13 and 14 of appellants' brief. In addition, we have in the record in the instant case, the conclusive fact that by omitting to deny the averments in the plea to the jurisdiction and in the petition for review, that the boat in dispute is partnership property, the law deems it to be such. It is so held by the authorities

cited at page 9 of appellants' brief and is undoubtedly the well settled law on the point, and being partnership property, it results, as held by the authorities cited at pages 10 and 20 of the brief, that the bankruptcy court has no jurisdiction to order the boat delivered to the trustee. In addition to this we have the conclusive point that as it is not alleged in the petition of the trustee in the summary proceedings, nor decided by the referee, nor in evidence in the case, that the adverse claim of Pearson to the boat as partnership property is merely colorable, the law holds *it is not, and deems it real, substantial and bona fide;* it is so held by the authorities cited at pages 14 and 27 of appellants' opening brief. Therefore neither the bankruptcy court or its referee would have jurisdiction of the boat, nor right to its possession, but the law requires the trustee to bring plenary suit in the State Court, pursuant to section 23 of the Bankruptcy Act, to recover it, if it is not partnership property. It is so held by the authorities cited at pages 13 and 14 of appellants' brief. It results for this reason also, that the referee's order directing the delivery of the boat to the trustee, is void for want of jurisdiction, it being the well settled law that competent jurisdiction to make such an order in summary proceedings, does not exist unless it be first alleged, proved and decided that the adverse claim to the boat as partnership property, is merely colorable. *This is a jurisdictional prerequisite having no existence in the instant case.* Without it, the order giving possession of the boat to the trustee, is clearly the denial of the "due process of law," required by

the Fifth Amendment, as held by the authorities cited at pages 17, 22 and 23 of appellants' opening brief.

Louisville Trust Co. v. Cominger, 184 U. S. 18, 25.

The conclusion based on principle and authority is that the *jurisdiction* of the bankruptcy court or its referee to make a "turnover" order such as the one here in question, in a case where there is an adverse claim to the property, is restricted to property in the actual or constructive possession of the court or its referee, or in other words to property in the possession of and claimed by the bankrupt as his at the time of the filing of his petition in bankruptcy or at the time he was adjudged bankrupt. And in such cases the court's jurisdiction is strictly limited to determining in summary proceedings whether the adverse claim to the property is *merely colorable* and not real, substantial and *bona fide.* If the adverse claim be held not merely colorable, but to be real, substantial and *bona fide,* then the jurisdiction to determine the issue of title is *exclusively* in the state courts, in a plenary suit, and their decision will be *res judicata* on the bankruptcy court. And in no case has the latter court or its referee, competent jurisdiction to order the property delivered to the trustee, until it has been first decided that the adverse claim is *merely colorable,* except in the one case where the property was unlawfully taken from the actual possession of the bankruptcy court and its referee, as in *White v. Schloerb,* 178 U. S. 542, 546, 547, which is not the case here. (See also *Metcalf v. Barker,* 187 U. S. 165, 176 and *Hinds v. Moore,* 134 F. 221, 223, 224.) Nor would

the bankruptcy court have jurisdiction of, or any right to the possession of partnership property, nor any constructive possession of partnership property, on a petition of and adjudication against only one of the partners and not including the partnership.

It is respectfully submitted that the decree appealed from is clearly erroneous in the particulars and for the reasons we have given in our briefs and that therefore it should be *reversed* with direction to annul the void order of the referee for delivery of the boat to the appellee.

Dated, San Francisco,
June 22, 1929.

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Arvid Pearson.
A. J. Hennessy,
Pro Se.

No. 5736

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY, *Appellants,* vs. A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt), *Appellee.*	}

ADDENDA AND SUPPLEMENT TO APPELLANTS' PETITION FOR A REHEARING.

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vs.

A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt),
Appellee.

ADDENDA AND SUPPLEMENT TO APPELLANTS' PETITION FOR A REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit, and to the Court:

It will probably be conducive to a clearer and better understanding of the case and of the petition for a rehearing, to set forth by this addenda and supplement to the petition, the opinion of Judge Dietrich, and in parenthesis point out analytically and more specifically, wherein it departs from the record and is also erroneous in matters of law.

I.

[Title of Court and Cause.]

"Before: RUDKIN, DIETRICH AND WILBUR, Circuit Judges.

DIETRICH, Circuit Judge:

The only question involved in this proceeding is whether a certain boat was the individual property of Louis Morgan, at the time he was adjudicated a bankrupt, or belonged to a copartnership consisting of the bankrupt and appellant Pearson. If the former, the trustee is entitled to possession, and if the latter, the trustee concedes right of possession in Pearson. That issue,—the only substantive one in the case—neither the referee nor the court below has determined."

(This entire paragraph of the opinion is inaccurate and proceeds on a misunderstanding of the record and the appeal; and it is also erroneous because it ignores the fundamental distinction between questions of *jurisdiction* and questions pertaining to the *merits*. The only questions possible on the record upon this appeal, are questions of *jurisdiction*. The record clearly shows there was no question or issue before the Court below or the referee, as to whether the boat in controversy is partnership property, and further that any such question is forclosed and precluded by the failure of the appellee to controvert the allegations of the sworn plea to the jurisdiction and the sworn petition for review, showing that the boat is partnership property. This state of the record is held by the authorities cited at pages 9, 10 and 20 of the opening brief of appellants, to be conclusive that the boat is partnership property. Being partnership property, the Bankruptcy Court has no *jurisdiction* over it, as

distinctly held by the authorities cited at pages 10 and 20 of the brief. Nor did the referee hold to the contrary, but merely decided and very erroneously decided that the Bankruptcy Court has *jurisdiction* and exclusive jurisdiction to determine *by trial,* the merits of the issue as to whether the boat is partnership property or not. The referee expressly and rightly refused to decide the matter on its merits and simply left it to the Court for trial and decision; but the well settled law is that the Bankruptcy Court has no *jurisdiction* whatever over the case on its merits, as distinctly held by the authorities cited on the point in the opening brief, it being held by the same authorities that the *jurisdiction* is exclusively in the state Court by virtue of Section 23 of the Bankruptcy Act, and in a plenary suit. The record also shows that at the time of the filing of the petition and of the adjudication in bankruptcy, this being the "jurisdictional line of cleavage" in the Bankruptcy Court, as held by all the authorities on the point, the boat was in the valid *custodia legis* of the state Court, and that when the referee made his "turn-over" order appearing at page 21 of the record and referred to at pages 29 and 32, the boat was also in the valid *custodia legis* of the state Court, where it has ever since remained. There is no allegation in the trustee's petition for the "turn-over" order, that the adverse claim of appellants to the boat is *merely colorable*, nor any evidence that it is, nor any decision by the referee that such is its character; therefore and as held by the authorities cited at pages 14 and 27 of the brief, the claim must be held *not* merely colorable, but real,

substantial and *bona fide,* and such being its character, it is held by the many authorities cited at pages 13 and 14 of the brief, that the *jurisdiction* to decide it on the *merits* is exclusively in the state Court. It results that in the excerpt above given from the opinion of Judge Dietrich in the case, it was and is inaccurate to say that the question involved *in these proceedings,* is whether the boat is partnership property, and it is equally inaccurate to say that this is "the only substantive issue in the case," and that "neither the referee nor the Court below has determined it." This latter assertion in the opinion, would be more complete and accurate if there were added to it, the statement, "and would have no jurisdiction to determine it," for it is so held by all the authorities on the point, many of which are cited in the opening brief. The addition here suggested and necessary to make the opinion accurate in this particular, would also serve to furnish a conclusive answer to it, as you will readily perceive. Of course we concede that as a general proposition of law, the Bankruptcy Court has jurisdiction to determine *in limine* whether an adverse claim of title is *merely colorable,* but that is the limit of its jurisdiction. It has no jurisdiction of a trial on the merits, as this is vested exclusively in the state Courts by Section 23 of the Bankruptcy Act, as held by the many authorities cited on the point, at pages 13 and 14 of the opening brief. If in the preliminary investigation or examination of the adverse claim, the Bankruptcy Court or its referee should hold the claim to be *merely colorable* it would then, but not otherwise have competent authority to make a valid "turn-

over" order, unless of course the case were one where the property had previously been in the actual custody of the Court or its referee and illegally removed therefrom, in which case, (which is not the case in the record here), it could be ordered restored by a "turn-over" order without any hearing or decision as to whether the adverse claim of title is merely colorable or not. As already pointed out, the "turn-over" order in the instant case relates to property never in the actual or constructive custody of the Bankruptcy Court, and therefore as held by all the authorities on the point, some of which are cited in the opening brief, the Court would have no jurisdiction to even determine whether the adverse claim of title to it as being partnership property, is merely colorable or not, and for this reason, no jurisdiction to make a "turn-over" order; but as shown by the record, the Court and its referee made the "turn-over" order appearing at page 21 and referred at pages 29 and 32, *without allegation, evidence, hearing, or decision that the claim is merely colorable,* thus eliminating from the case so far as this appeal is concerned, the only matter over which the Court could by any possibility have jurisdiction as an essential prerequisite to the validity of the "turn-over" order the referee made. The statement in the opinion of Judge Dietrich that no "turn-over" order was made, is refuted by the record, pages 21, 29 and 32. For the reasons we have given and fully sustained by the authorities cited in our briefs, the "turn-over" order, though sufficient in form (*Muller v. Nugent*, 184 U. S. 1; *Allen v. Voje*, 114 Wis. 1, 8; *United States v. Terry*, 41 F. 771, 773,

774), is void for want of jurisdiction, and therefore the District Court committed reversible error in *confirming* the order and denying the petition for review. The appeal therefrom is valid and the record amply sufficient to present the jurisdictional questions raised by appellants. It therefore is required by law that the appeal be determined on its merits and not dismissed.)

II.

The opinion of Judge Dietrich, next proceeds as follows:

> "The referee decided only that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. Being discontent with this ruling, made upon a preliminary objection, appellants without awaiting the event of a trial on the merits, petitioned the District Judge for a review, and the order from which the appeal is prosecuted went no further than to deny the petition. Manifestly, therefore, the appeal is premature."

(Now the obvious and conclusive answer to this is that the referee not only decided and very erroneously decided that the Bankruptcy Court had jurisdiction to entertain the issue, it being the well settled law as shown by the many authorities cited in appellants' briefs that no such jurisdiction exists, but the referee went further and made the following void "turnover" order:

> "The Referee: In the making of this order overruling the plea to the jurisdiction, the referee goes further and holds that the trustee is entitled

to the possession of the boat, *and the order is that the boat be delivered to the trustee.* Under *this order of delivery, however, I will grant you a stay of five days. So ordered.*" (R. 21, 29, 32.)

The order to show cause on which this "turn-over" order was made, expressly says:

> "It is ordered that Arvid Pearson and A. J. Hennessy show cause, if any they have, on the 27th day of October, 1928, at 10 o'clock A. M. why the said Arvid Pearson and A. J. Hennessy should not immediately *turn over* and deliver to the said A. W. Higgins, trustee herein, the possession of the boat 'Saxon.'" (R. 6.)

The statement in the opinion of Judge Dietrich that

> "appellants without awaiting the event of a *trial on the merits,* petitioned the District Judge for a review, and the order from which the appeal is prosecuted went no further than to deny the petition,"

is conclusively answered by the point, sustained as it fully is, by the authorities cited in appellants' briefs, that upon the record, there is no *jurisdiction* in the Bankruptcy Court or its referee to hold *"a trial on the merits,"* as the jurisdiction is vested exclusively in the state Courts by Section 23 of the Bankruptcy Act to hold such trial; therefore appellants were not required by law to await the event of a *trial on the merits* before the Bankruptcy Court, as such a trial would be absolutely void for want of jurisdiction. And Judge Dietrich is in error in stating as he does in the opinion filed, that the order from which the appeal is prosecuted "went no further than to deny the petition," as it does go further and *confirms* the

"turn-over" order of the referee. (R. 21, 29, 32, 39, 40.) But denying the petition for review, containing the prayer that the "turn-over" order be adjudged void for want of jurisdiction, is manifestly sufficient to present the jurisdictional question on the appeal. It results that the appeal is not premature and that Judge Dietrich is mistaken in stating that it is. Of course the evident purpose of the "turn-over" order as made by the referee, is the illegal one to bring the boat into the prohibited jurisdiction of the Bankruptcy Court *for trial on the merits* of the adverse claim of title asserted by appellants. Doubtless they could consent to such a trial, but it would be void in any event as it is elementary that consent cannot give jurisdiction over the subject matter. Nor would appellants ever give their consent, as the case is properly before the state Court in the claim and delivery action there pending and awaiting trial in due course, and the boat is in the valid *custodia legis* of that Court, and in said action, as held by the many authorities cited on the point, in appellants' briefs. It would therefore manifestly be worse than futile to "await the event of a trial on the merits" in the Bankruptcy Court, such as required by the opinion of Judge Dietrich, when it is clear from the record and the well-settled law on the point, that the Bankruptcy Court is entirely without jurisdiction of the case, so far as the appellants are concerned.)

III.

The opinion of Judge Dietrich then proceeds and concludes:

> "In an ordinary case at law or in equity an order overruling an objection to the courts' jurisdiction is not appealable; and no more is a like order in a bankruptcy proceeding. Appellants could have no real grievance unless and until the referee entered a turn-over order. After a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain. Appellate courts do not sit to anticipate possible grievances or to try out controversies in piecemeal. The appeal will, therefore, be dismissed without prejudice to any question of jurisdiction or upon the merits. Costs to appellee."

(What we have already said herein, sufficiently and we think conclusively answers this portion of the opinion. The order here involved is the "turn-over" order of the referee, appearing in the record, pages 21, 29, 32, and Judge Dietrich is mistaken in disposing of the case as if no such order had been made. He is also mistaken in asserting that "after a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain." The obvious and conclusive answer to this is that the Bankruptcy Court has no jurisdiction of a trial or hearing *on the merits,* but as held by the authorities cited on the point in appellants' briefs, the jurisdiction is exclusively in the state Court, under Section 23 of the Bankruptcy Act and under the general doctrine of well settled law, that the valid *custodia legis* of the state Court, respecting the boat in

controversy, precludes such a thing as jurisdiction of the issue or the case, by the Bankruptcy Court. That the *custodia legis* of the state Court is valid and exclusive is clearly shown in the briefs of appellants and by the many authorities there cited, bearing in mind of course that the jurisdiction of the state Court rests upon the averment in the complaint there filed, that the boat is *partnership property* (R. 8, 9), from which it results that the Bankruptcy Court would have no jurisdiction over it, as held by the authorities cited at page 10 of appellants' opening brief. And also bearing in mind that in the record on this appeal and as held by the authorities cited at page 9 of the brief, the appellee has admitted that the boat is partnership property. Also bearing in mind that the well settled law requires it be held on this appeal and upon the record, that the adverse claim of title to the boat as partnership property, must be considered real, substantial and *bona fide,* as held by the authorities cited at pages 14 and 27 of the brief, and therefore it results that the jurisdiction is exclusively in the state Court, under Section 23 of the Bankruptcy Act, and so held by the authorities cited at pages 13 and 14.)

IV.

In conclusion, not only is the opinion fundamentally erroneous in disregarding the referee's "turn-over" order appearing in the record, pages 21, 29 and 32, but it entirely fails to answer the important objection that the order operates to deprive the appellants of their property without "due process of law" and in

violation of the Fifth Amendment, by taking it from their possession, which at present is also the *custodia legis* of the state Court, and so held by the authorities cited at page 19 of the opening brief and page 13 of the record, and giving it to the trustee, *before* there is any hearing or decision upon their legal right to retain the possession and without any allegation in the trustee's petition for the "turn-over" order and without any evidence or decision in the case that appellants' adverse claim of title to the boat as partnership property is *merely colorable.* That in such a case to take the boat from their possession by the "turn-over" order appearing at page 21 and mentioned as such by the referee, at pages 29 and 32 of the Record, and give it to the trustee and compel appellants to thereafter litigate their claim to the boat before the Bankruptcy Court, which according to all the authorities on the point, has no jurisdiction of the matter, is depriving them of their property without "due process of law" is distinctly held by the authorities cited at pages 17, 22 and 23 of the opening brief and page five of the petition for a rehearing. This conclusive point, going to the *jurisdiction* of the referee to make the "turn-over" order, has doubtless been disregarded and erroneously disregarded, by reason of the mistaken and inadvertent assertion in the opinion that no "turn-over" order has yet been made. If the order appearing in the record at page 21 and referred to at pages 29 and 32 is not a "turn-over" order, as contended by the parties and held by the District Court and its referee, then it should be explicitly so decided on this appeal and

not left to mere inference. As the matter now stands it is uncertain and cannot be ascertained from your opinion and decision whether you hold that the order is insufficient in form or substance as a "turn-over" order, or you have failed to discover its existence in the record. In the event of an attempt to enforce the order, the question would become important. It is important anyway that the validity of the order be determined on this appeal. If the order is held to be imperfect or insufficient in form or substance, then according to the rules governing appellate remedial procedure, the law requires that on this appeal the jurisdictional questions presented by appellants be determined. It is only the complete absence of a "turnover" order, not merely an imperfect one, that would justify the dismissal of the appeal.

V.

It is respectfully submitted that the petition for a rehearing should be granted.

Dated, San Francisco,
July 25, 1929.

George D. Collins, Jr.,
A. J. Hennessy,
Attorneys for Appellant and Petitioner, Arvid Pearson.
A. J. Hennessy,
Pro Se.

VI.

Certificate of Counsel.

It is hereby certified that in our judgment and in the judgment of each of us, the foregoing *addenda* and supplement to the petition for rehearing heretofore served and filed, is well founded; and we do further hereby certify that said addenda, supplement, and petition are not interposed for delay.

George D. Collins, Jr.,
A. J. Hennessy,
Counsel for Appellant and Petitioner, Arvid Pearson.
A. J. Hennessy,
Pro Se.

No. 5736

8

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ARVID PEARSON and A. J. HENNESSY,
Appellants,

vs.

A. W. HIGGINS, as Trustee in Bankruptcy of Louis Morgan (a Bankrupt),
Appellee.

APPELLANTS' PETITION FOR A REHEARING.

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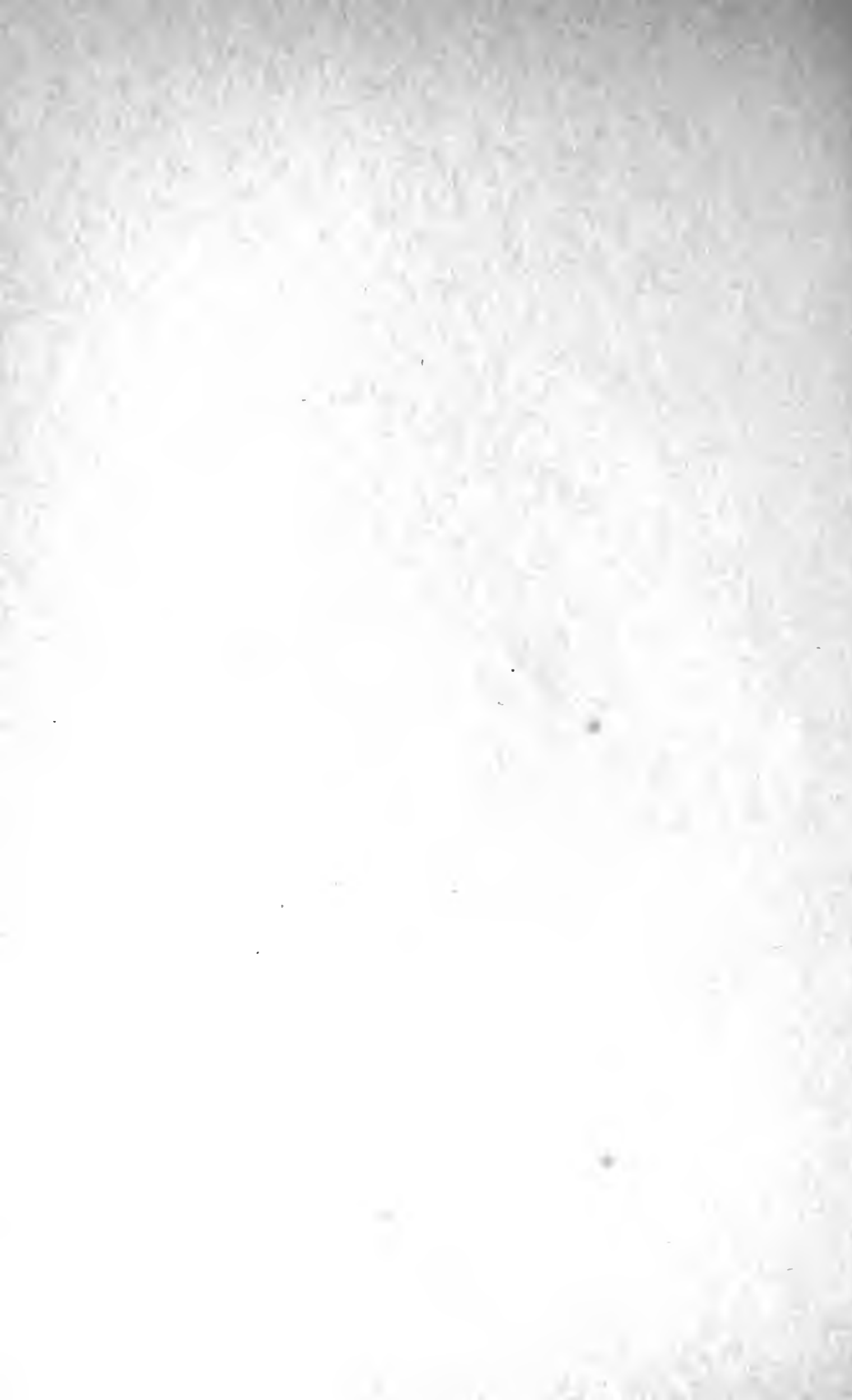

No. 5736

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APPELLANTS' PETITION FOR A REHEARING.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit and to the Court:

I.

The appeal in this case was dismissed by you four days ago, to wit: on the 15th day of July, 1929, and solely upon a ground clearly and directly contradicted by and in conflict with the record, viz.: *that the referee in bankruptcy made no "turn-over" order.* The record certainly shows HE DID, and that the order as therein stated, is as follows:

"The REFEREE: In the making of this order overruling the plea to the jurisdiction, the referee goes

further and holds that the trustee is entitled to the possession of the boat, and the order is that the boat be delivered to the trustee. Under this order of delivery, however, I will grant you a stay of five days." (Record, p. 21.) At pages 22, 23, 25, 26 and 27 of the record, the petition to the District Court for review of this order, expressly specifies it as the sole and only basis of the petition. At pages 29 and 32 of the record, the *referee* in response to the petition, adverts to this "turn-over" order as having been made by him. At pages 29, 32, 37 and 38 of the record, he expressly states that the above quoted "turn-over" order was made by him; this statement of the referee in response to the petition for review, is required by General Order XXVII in Bankruptcy. In deciding the petition for review of this "turn-over" order of the *referee,* the District Court on briefs and argument directed specifically to the invalidity of the "turn-over" order, denied the petition and confirmed the order by confirming the *referee's* report relating to it. (Record, pp. 17, 21, 29, 31, 32, 37, 38.) Clearly this decree of the District Court is appealable under Section 24a of the Bankruptcy Act as amended May 28, 1926. (44 Stat. 662.) It is distinctly so held in:

> Taylor v. Voss, 271 U. S. 180, 181, 183; 46 S. C. Rep. 461, 463, 464, 465;
> Harrison v. Chamberlin, 271 U. S. 191, 193;
> Gibbons v. Goldsmith, 222 F. 826, 828;
> Clark v. Huckaby, 28 F. (2d) 154, 156, 157.

The appellants' briefs explicitly specify repeatedly *the record fact that the "turn-over" order was made by the referee.* See opening brief, pages 1, 3, 4, 8, 14,

16, 17, 22, 23, and reply brief, pages 2, 4, 5, 15, 16, 18, 19, 20 and 21. And so does the brief of the appellee and so do the assignments of error. (Record, pp. 42, 43, 44 and 45.) And so do the specifications of error as set forth at pages 7 and 8 of the opening brief of appellants, and the "turn-over" order is also indicated in the referee's order to show cause as appearing at page 6 of the record, and upon which the "turn-over" order was made. The certified transcript of the record as furnished on the appeal, contains the "turn-over" order of the referee, as per the praecipe. (Record, pp. 1, 2, 21, 29, 32, 37, 38, 48.) The point or ground upon which the appeal has been erroneously dismissed by you, is not only entirely without support in the record and clearly in conflict with the record, but it is a point and ground not raised by counsel for appellee in their brief nor at the oral argument nor by you during the course of the argument, nor in the District Court upon the petition for review, nor at all. This alone should induce reconsideration.

Clearly it would not be right or legal or just to put the appellants to the expense and delay of another appeal to obtain the remedy the law plainly gives them against the existing void "turn-over" order of the referee, when the necessary remedy can and should be had by the present and pending appeal. The record is clear that the proceedings and decree of the District Court on the petition for review, are based on the uncontroverted and unquestioned fact that the referee made the "turn-over" order and the Court below in denying the petition, sustained the order, for the

prayer of the petition is that the order be "vacated, set aside and annulled." (Record, pp. 22, 27.) Not only the appellants contend, but the *appellee* contends that the "turn-over" order was made by the referee precisely as appears at pages 21, 29 and 32 of the record. If it is not a "turn-over" order, the parties have the right on this appeal to an explicit decision on the point, for it is considered by them and by the referee and by the District Court to be such an order. The existence of the order is alleged in the petition, as appears at page 22 of the record, and not traversed by answer. This it is held is conclusive of the fact, by the authorities cited at page 9 of appellants' opening brief. The appeal is properly taken from the order and decree of the District Court, denying the petition for review and confirming the order and proceedings of the referee. (Record, pp. 39, 40.) There is no such thing as an *appeal* from the referee's "turn-over" order, but the appeal as properly taken and perfected, from the decree of confirmation, and denial of the petition, involves the validity of the order.

II.

You erroneously say in your opinion on file in the case, that

> "the referee decided *only* that in a summary proceeding, instituted by the trustee, the bankruptcy court had jurisdiction to entertain the issue. * * * Appellants could have no real grievance unless and until the referee entered a turn-over order."

The *record* at pages 4, 5, 6, 17, 18, 21, 22, 23, 25, 26, 27, 29, 31, 32, 37, 38, shows that the referee not only erroneously decided that in a summary proceeding instituted by the trustee, the Bankruptcy Court had jurisdiction to entertain the issue, but also that on the very basis of this plainly erroneous ruling, the referee made and entered the "turn-over" order requiring appellants to deliver possession of the boat "Saxon" to the trustee, thereby in summary proceedings, taking the boat from appellants and giving it to the trustee without any hearing or decision respecting the legal right of appellants to have and retain possession of the boat as partnership property, and without allegation by the trustee or the slightest evidence that the adverse claim of appellants to the boat is merely colorable and not real, substantial and *bona fide;* it results that the "turn-over" order of the referee is void, it being clearly in violation of the Fifth Amendment of the Constitution of the United States in depriving appellants of their property without due process of law as distinctly held by all the authorities on the very point, some of which we cite:

> Marshall v. Knox, 16 Wall. 551, 555, 556, 557;
> Smith v. Mason, 14 Wall. 419, 431, 433;
> Louisville T. Co. v. Cominger, 184 U. S. 18, 25;
> Havemeyer v. Superior Court, 84 Cal. 327, 396, 397, 400, 401;
> Stuparich v. Superior Court, 123 Cal. 290, 292.

We of course concede that if the referee had made no "turn-over" order, and had only overruled the plea to the jurisdiction, and did nothing more than that, there would be nothing to support the appeal; but

the record here is clear, direct and conclusive that the "turn-over" order was made by the referee, and on the basis of his plainly erroneous order overruling the appellants' objection to the jurisdiction; your undoubtedly erroneous decision to the contrary, is certainly refuted by the record as it stands before you on this appeal. True the "turn-over" order was not made upon a hearing on the merits as to whether the boat is or is not partnership property, but this could not legally be done by the Bankruptcy Court or its referee, for want of competent jurisdiction to do it, as held by the many authorities cited at pages 13 and 14 of appellants' opening brief; and in any event it can make no difference that the "turn-over" order was not made upon a hearing on the merits, for it is the legal and constitutional right of the appellants to defend and retain their possession of the boat under the adverse claim of title they assert to it as being partnership property and against the manifestly void "turn-over" order of the referee, requiring them in summary proceedings to at once surrender and deliver the boat to the trustee and *thereafter* litigate their right to its possession, thus illegally and in violation of their constitutional right, first dispossessing them of their property without "due process of law," and then compelling them to go to Court to recover it. Were they to comply with the existing void order of the referee and deliver the boat to the trustee, as required by it, there could be no such thing as a subsequent "turn-over" order in a *trial* that if held, would be necessarily void for want of jurisdiction, if had on the merits of the issue as to whether the boat is

partnership property or not, for the trustee would have the possession. This answers your suggestion about appellants having appealed "without awaiting the event of a trial on the merits," and that "after a hearing on the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain." They certainly have ground to complain against a *trial* that if had would undoubtedly be void *for want of jurisdiction,* as held by the authorities cited at pages 13 and 14 of the opening brief. Therefore this present opportunity by means of the pending appeal is the only one appellants can have to contest the validity of the "turn-over" order as heretofore made by the referee upon the petition of the trustee and on the incidental order to show cause, appearing in the record at pages 2 to 6, inclusive. Appellants' right to make the contest on the appeal, results from the decree of the District Court confirming the referee's void "turn-over" order, and denying the petition to vacate and adjudge it void, (Record, pp. 22 to 27, 39, 40), upon a review pursuant to General Order XXVII of the General Orders in Bankruptcy and Rule 9 of the Rules of the District Court respecting proceedings in bankruptcy. That the decree of the District Court is appealable under Section 24a of the Bankruptcy Act as amended May 28, 1926, (44 Stat. 662), is distinctly held to be the law, by the authorities herein cited on the point.

III.

You say in the opinion on file that "after a hearing upon the merits, the trustee's prayer may be denied, in which contingency appellants will have no ground to complain." The obvious and conclusive answer to this suggestion is that in the first place and as held by the many authorities cited at pages 13 and 14 of the opening brief, and upon the facts shown by the record, the Bankruptcy Court and its referee have no jurisdiction to hold a hearing on the merits of the adverse claim, and in the next place and in the meantime, the appellants are deprived by the referee's void "turn-over" order, of the possession of their property, taken from them without due process of law and in violation of the Fifth Amendment, it being the fact established by the record that the referee made the "turn-over" order, without allegation, proof or decision or hearing tending in the slightest degree to show that appellants' adverse claim to the boat is merely colorable and not real, substantial and *bona fide*,—a conclusive and jurisdictional point against the validity of the order, as held by the authorities cited in the opening brief; and it being also clear from the case as presented by the record, that neither the Bankruptcy Court, its referee or the trustee ever had the requisite jurisdictional possession, actual or constructive, of the boat as the necessary competent and valid basis and essential condition precedent to the existence of a right in the Court or its referee to determine *on its merits* the issue either in plenary suit or summary proceedings, to wit: the issue whether the adverse

claim of appellants to the boat as partnership property is sustained by the law and the facts, or merely colorable, and it being also clearly established by the record that the boat is in a perfectly valid *custodia legis* of the state Court and it being the well settled law as shown by the many authorities cited at pages 13 and 14 of the opening brief, that the jurisdiction to determine the case and the issue on its merits, is *exclusively* in the state Court, in the plenary suit there pending. All these plainly conclusive points amply sustained by the many authorities cited in appellants' briefs, pertain to the merits of the appeal now pending before you, and on principle and authority, as fully shown in the briefs, they are certainly entitled to have them determined on this appeal and on the record as it stands, your fundamental mistake being in assuming *contrary to and in conflict with the record,* that there was no "turn-over" order made by the referee, when the record shows clearly that the order was made. (Record, pp. 21, 29, 32.)

IV.

There is yet another aspect of the case, conclusively showing that your decision is contrary to well settled law, for in the reasoning upon which your ruling is based, you virtually and erroneously hold that the District Court in bankruptcy and its referee have competent jurisdiction to determine the issue *on its merits,* whether the boat in controversy is or is not partnership property, when according to the many au-

thorities cited at pages 13 and 14 of appellants' opening brief and according to Section 23 of the Bankruptcy Act, the jurisdiction to decide the issue is *exclusively* in the state Court and in a plenary suit. And you evidently in this matter have entirely overlooked the conclusive point made by appellants and the many authorities sustaining it, cited at page 9 of the opening brief, that the record shows on the face of it, *that the appellee has admitted that the boat is partnership property* and therefore it is not and cannot be subject to the jurisdiction of the District Court or its referee in the bankruptcy case, as distinctly held by the numerous authorities cited at page 10 of the brief. Such being the case before you, clearly your reasoning impliedly conceding to the Bankruptcy Court as it erroneously does, competent and legally sufficient jurisdiction to determine the question as to whether the boat is partnership property or not, is undoubtedly contrary to all the authorities on the point, and plainly erroneous in every possible aspect of the case presented by the record. Manifestly your ruling that the Bankruptcy Court and its referee have jurisdiction to determine the question, the boat never having been in the actual or constructive possession of either, as shown in both the opening and reply brief, and to do this by a *trial on the merits,* is certainly a ruling in conflict with well settled law, according to the numerous authorities cited at pages 13 and 14 of the opening brief.

V.

It is true there is no appeal from an order erroneously overruling an *objection* to the jurisdiction, but there certainly is an appeal from a denial by the District Court, of a petition to review and annul proceedings of a referee in bankruptcy, based upon such an order and subsequently culminating as plainly shown by the record here, in a void "turn-over" order, the referee had no jurisdiction to make, as against the real, substantial and *bona fide* adverse claim of title asserted by the appellants and held to be such by the authorities cited at pages 14 and 27 of the opening brief. In such a case and as decided by all the authorities upon the point, the jurisdiction to hear and determine the issue presented, as to whether the boat is partnership property or not, is *exclusively* in the state Court and in a plenary suit, the Bankruptcy Court never having had either actual or constructive possession of the boat. Your reasoning and your decision to the contrary, are clearly in conflict with this well settled law on the subject, as shown by the numerous authorities cited at pages, 11, 13, 14, 15, 16, 17 and 18 of the opening brief, for what you have actually done is to remit to the bankruptcy court and its referee, for decision, an issue over which neither can have jurisdiction, as held by all the authorities on the point. Dismissing the appeal without prejudice to the question is manifestly no answer to this objection. And in any event the ground on which you dismissed the appeal is not sustained by the record, a conclusive point already sufficiently discussed herein.

VI.

The record on the appeal, clearly shows that the referee made the "turn-over" order appearing therein at page 21 and referred to at pages 29 and 32, without allegation in the trustee's petition for the order, and without proof or decision that the adverse claim of title asserted by appellants is merely colorable and not real, substantial or *bona fide*. Now as held by the authorities cited at pages 14 and 27 of the opening brief, in this condition of the record, the law deems the adverse claim to be real, substantial and *bona fide* and not merely colorable, and therefore and as held by the many authorities cited at pages 13 and 14 of the brief, the Bankruptcy Court and its referee would have no jurisdiction to make the "turn-over" order appearing at page 21 of the record. It also clearly appears from the record that the "turn-over" order was made by the referee, for the sole purpose of bringing the boat in controversy into the jurisdiction of the Bankruptcy Court to have it there determined whether it is partnership property or not, the appellants being thus and thereby deprived of their legal and constitutional right to retain the possession of the boat until it is first decided by competent judicial authority, that the boat is not partnership property, but is the individual property of the bankrupt, or that their adverse claim of title is merely colorable. This procedure on the part of the referee in making the "turn-over" order for the purpose stated, is of course in violation of the "due process of law" clause in the Fifth Amendment as held by the authorities cited on the point in the opening and closing briefs

of the appellants. The referee also manifestly erred in holding as the record shows, that exclusive jurisdiction is in the Bankruptcy Court to determine on its merits the issue of title as to whether the boat is or is not partnership property, whereas according to all the authorities on the point, many of them cited in the opening brief, pages 13 and 14, the jurisdiction to determine the issue on its merits in the instant case, is *exclusively in the state Courts* as provided in section 23 of the Bankruptcy Act, and in a plenary suit, the Bankruptcy Court and its referee having only jurisdiction to determine whether the claim is merely colorable or not and then only if on allegation and proof, adjudged merely colorable, to make a "turn-over" order if and only if the Bankruptcy Court and its referee had either the actual or constructive possession of the boat in controversy at the time of the filing of the petition and the making of the adjudication in bankruptcy, a jurisdictional essential not existing in the instant case, as the boat was then in the valid *custodia legis* of the state Court under its writ of execution, as held by the Supreme Court in *Liberty Nat. Bank v. Bear,* 265 U. S. 365, 368 to 371 and *Taubel v. Fox,* 264 U. S. 426, 430 to 434, 437, 438. And the record before you is clear that prior to and at the time the "turn-over" order was made by the referee, the boat was then, ever since has been and now is in the valid *custodia legis* of the state Court in the there pending action of claim and delivery, now awaiting trial in due course, and in which pending action, the state Court is given *exclusive* jurisdiction by section 23 of the Bankruptcy Act, to determine the issue as to whether the boat is partnership property or

not, and its decision will be *res judicata* on the Bankruptcy Court and its referee, as held by the authorities cited on the point, at page 21 of the opening brief, a conclusive point in the case, also fully sustained by the many authorities cited at pages 13 and 14 of the opening brief. From all of which it results that the referee's "turn-over" order is absolutely void for want of jurisdiction. Now in dismissing the appeal you have thereby and in the reasoning on which you base your decision, and in impliedly at least, conceding to the Bankruptcy Court and its referee the authority to proceed to a hearing and trial of the adverse claim of title, on its merits, come into conflict with the well settled law that they have no such jurisdiction in the case, upon the facts presented by the record. For this reason also the petition for a rehearing should be granted.

VII.

In the event this petition for a rehearing is denied, we respectfully request a further stay of mandate for thirty days to enable us to file and docket within that period of time, the proper application to the Supreme Court of the United States for the writ of *certiorari,* concurrently with which we can also apply to the Court for leave to file a petition for mandamus compelling a hearing and decision of the appeal on its merits.

VIII.

For the reasons and upon the grounds stated in this petition for a rehearing, the appellants pray that it be granted and the appeal be determined on its merits, as required by law.

Dated, San Francisco,
July 19, 1929.

All of which is respectfully submitted.

George D. Collins, Jr.,
A. J. Hennessy,
Attorneys for Appellant and Petitioner, Arvid Pearson.
A. J. Hennessy,
Pro Se.

Certificate of Counsel.

It is hereby certified that in our judgment and in the judgment of each of us, the foregoing petition for a rehearing is well founded and we do further hereby certify that it is not interposed for delay.

George D. Collins, Jr.,
A. J. Hennessy,
Counsel for Appellant and Petitioner, Arvid Pearson.
A. J. Hennessy,
Pro Se.

No. 5740

IN THE 9

United States Circuit Court of Appeals
For the Ninth Circuit

D. L. McCLUNG,

Appellant

vs.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

FILED

MAR 1 ...

PAUL P. O'BRIEN

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant

vs.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees

Transcript of the Record

On Appeal from the District Court of the United States for the District of Idaho, Southern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

J. B. ELDRIDGE,
Boise, Idaho.
Attorney for Appellant.

WALTERS, PARRY AND THOMAN,
Twin Falls, Idaho.
Attorneys for Appellees.

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In the District Court of the United States for the District of Idaho, Southern Division

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OLIVER HILL; W. P. RICE; E. C. GLEASON; CLARA T. VEAZIE; H. E. BARRETT; A. A. HOLBROOK; ROMAN M. TISS; LEWIS A. LEINBAUGH; J. F. HOBBS; JOHN T. THORPE,

Plaintiffs

vs.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Defendants

ROBERT ROGERSON, KENNETH McLEOD and BLAINE FURGERSON,

Intervenors

NOTICE OF MOTION

To the above named defendants and to the intervenors and to E. A. Walters, Esq., Hawley and Hawley, Esquires, and to E. M. Wolfe, Esq., their attorneys of record.

You and each of you will please take notice that the supplemental complainant, D. L. McClung, will move the court at the court-room of the Federal Building in Boise, Idaho, on the 22nd day of December, 1927, at the hour of 10:00 o'clock A. M. of said

day to make an order permitting the supplemental complainant D. L. McClung to file his supplemental complaint, herein copy of which is attached to the motion, motion and copy of supplemental complaint being hereto attached and made a part thereof.

That said motion will be made upon the supplemental bill of complaint of D. L. McClung and upon the original pleadings, papers, records and files in said cause.

J. B. ELDRIDGE,
Attorney for Supplemental Complainant
Residence, Boise, Idaho.

Endorsed: Filed Dec. 7, 1927.
By W. D. McREYNOLDS, Clerk
By VERNA THAYER, Deputy.

(Title of Court and Cause)

MOTION

Comes now the supplemental complainant, D. L. McClung, and moves the court for an order permitting the supplemental complainant to file his supplemental bill of complaint for the reasons and upon the grounds set forth in said supplemental bill of complaint, copy of which is hereto attached and made a part hereof.

J. B. ELDRIDGE,
Attorney for Supplemental Complainant, D. L. McClung,
Residence, Boise, Idaho.

Endorsed: Filed Dec. 7, 1927.
W. D. McREYNOLDS, Clerk.
By VERNA THAYER, Deputy.

(Title of Court and Cause)

SUPPLEMENTAL BILL IN EQUITY

Comes now D. L. McClung and for SUPPLEMENTAL BILL IN EQUITY alleges and states:

I

That on the 13th day of April, 1916, Oliver Hill and others filed their Amended Bill of Complaint in said cause, to which reference is hereby made and by such reference made a part hereof.

II

That on December 20, 1917, pursuant to motion theretofore made, Robert Rogerson and others filed their Bill of Intervention in said cause December 20, 1917, to which reference is hereby made and by such reference made a part hereof.

III

That on December 20, 1917, stipulation between all said litigants was filed for decree, copy of which marked EXHIBIT "A" is hereto attached and made a part hereof.

IV

That decree was entered on December 20, 1917,

in said cause, copy of which marked EXHIBIT "B" is hereto attached and made a part hereof.

V

That your complainant herein was at the time of the filing of the original and said Amended Bill and Bill in Intervention, Stipulation and Decree, and is now the owner of the following described land, to-wit: The Northeast quarter of the Southeast quarter and the Southeast quarter of the Northeast quarter of Section Two, Township Ten South, Range 18 East, Boise Meridian, Jerome County, State of Idaho, situate upon and as a part of Northside Irrigation Project and the owner of the right to receive one-eightieth second foot for each acre of land under what is known as first segregation contract as set forth in said Amended Bill and was one of the parties on whose behalf said cause was prosecuted and maintained, and on whose behalf said stipulation was signed and on whose behalf said decree was rendered.

VI

That on or about the months of April and July, 1907, respectively, one Fred Waite, the predecessor in interest of your supplemental complainant entered into his certain water right contracts with Twin Falls North Side Land and Water Company, said contracts being of the same kind and character as the settlers' contracts set forth and described in

the Amended Bill and the Bill in Intervention in this cause wherein and whereby a water right was acquired for the lands belonging to this supplemental complaint described as aforesaid:

That subsequently stock certificates in North Side Canal Company were issued to supplemental complainant herein, copies of one of said contracts and certificates marked EXHIBITS "C" and "D" are hereto attached and made a part hereof said contract and stock certificate being of the same character and import as issued to all settlers under said project.

VII

That your supplemental complainant has performed all the obligations on his part to be performed under said contracts and hereby offers to do equity and to subject himself to the equitable consideration of the court.

VIII

That under the terms of said decree the United States District Court for the District of Idaho adjudged and decreed that the several contracts set forth in the Bill of Complaint and their amendments shall remain in full force and effect between all parties concerned therein; that your supplemental complainant is deeply interested in said contracts.

IX

That said Court adjudged and decreed that the construction company had the right to sell and keep sold 170,000 shares of stock carrying with it the right to irrigate 170,000 acres and no more, and that no other or further shares of stock should be sold if by so doing the settlers' contracts would be violated.

X

That Twin Falls North Side Land and Water Company has made no attempt until within approximately the last few months to sell or dispose of stock in North Side Canal Company, Ltd., in excess of 170,000 shares and has within said time offered for sale and is now offering for sale, and unless restrained and enjoined by order of this court, will sell stock in excess of 170,000 shares which shares will entitle land in excess of 170,000 acres to receive water for irrigation out of the present water supply of the North Side Canal Company to the injury of complainant and in violation of his contract with said Twin Falls North Side Land and Water Company, then and now in force and in violation of said decree; that the present available water supply furnished by said Land and Water Company for said North Side Canal Company is insufficient to supply the amounts already contracted to be furnished to settlers; that the present capacity of the irrigation system furnished by said Land and Water Com-

pany for said North Side Canal Company is not sufficient to permit of the delivery of the amounts already contracted to be delivered to settlers by said Land and Water Company; that the dependable operating capacity of the system is not more than 3360 second feet and there is a water loss of 40 per cent of making deliveries through said system; and that 3360 second feet of water if available in the system will only furnish and deliver the contract amounts of water to 163,080 acres under said state and settlers' contracts now outstanding.

XI

That said Twin Falls North Side Land & Water Company, defendant herein, is offering to sell 15,000 shares of stock more representing water for use on 15,000 acres additional lands to be irrigated from the said water supply, and to be irrigated from the canal system belonging to the lands of the North Side Project as aforesaid, which are wholly and notoriously inadequate to furnish water, therefor, in that said system has never been completed in conformity with said decree and that further sale of additional shares of stock and water rights to additional lands as is now proposed and threatened by defendant, Twin Falls North Side Land and Water Company as aforesaid, and in violation of said decree, will cause great and irreparable injury to your Supplemental Complainant and all others similarly situated.

XII

That there are a large number of water users holding contracts similar to that of your supplemental complainant herein, and on account of the vast numbers interested as your complainant is interested, it would be impracticable to bring them all before the court and your supplemental complainant brings this supplemental proceeding on behalf of himself and all such persons similarly situated, on whose behalf the Bill in Intervention herein was prosecuted, and decree entered thereon.

That your supplemental complainant and others similarly situated have no plain, speedy and adequate remedy at law.

XIII

That your supplemental complaint brings this action in aid of said former decree rendered by this court and for the enforcement thereof, and to render said decree operative and effective.

XIV

That your supplemental complainant and those on whose behalf this action is brought are citizens and residents of the State of Idaho.

That all said acts and doings as aforesaid are contrary to equity in good conscience and tend to manifest wrong, injury and oppression of this supplemental complainant and those similarly situated in the premises. In consideration whereof and for

as much as this plaintiff is remediless in the premises at and by the strict rules of a Common Law and can only have relief in a Court of Equity where matters of this nature are recognizable and relievable, this plaintiff now prays the Court:

First

That an order of this court be issued permitting supplemental complainant to file his supplemental bill herein.

Second

That defendant, Twin Falls North Side Land and Water Company, be restrained and enjoined permanently from the sale of any further water rights to be supplied under said state and settlers' contracts, out of the water supply available at the time said decree was entered, and restrained and enjoined from the sale of any further water or water to be carried through said canal as now constructed.

Third

That Twin Falls North Side Land and Water Company be required to complete said irrigation system in conformity with said contracts.

Fourth

That if the Court shall find it expedient and necessary, that the Court appoint a party to take charge of said irrigation works and complete the

same at the expense of said Twin Falls North Side Land and Water Company, so as to make possible the delivery of the contracted amounts of water for 170,000 acres to the end that the settlers' contracts shall not be violated.

Fifth

That your supplemental complainant and those similarly situated have such other and further relief as to the Court may appear just in the premises.

J. R. ELDRIDGE,

Attorney for Supplemental Complainant

Residence: Boise, State of Idaho.

STATE OF IDAHO)
) ss
COUNTY OF ADA)

D. L. McClung being first duly sworn deposes and says: That he is the supplemental complainant in the above entitled cause and has read the within and foregoing supplemental bill of complaint and knows the contents thereof, that he believes the facts stated in the pleading to be true.

D. L. McCLUNG.

Subscribed and sworn to before me this the 9th day of November, 1927.

C. H. ROBERTS,

Notary Public
Residing at Boise, Idaho

(SEAL)

EXHIBIT "A"

IN EQUITY

In the District Court of the United States for the District of Idaho, Southern Division

---

OLIVER HILL; W. P. RICE; E. C. GLEASON; CLARA T. VEAZIE; H. E. BARRETT; A. A. HOLBROOK; ROMAN M. TISS; LEWIS A. LEINBAUGH; J. F. HOBBS; JOHN T. THORP,

Plaintiffs

VS

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Defendants

No. 544

STIPULATION SETTLING CASE AND FOR JUDGMENT

For the purpose of effecting a complete and financial settlement of the above entitled action, and of all the issues and differences set forth or involved therein, it is hereby stipulated and agreed by and between the plaintiffs above named, acting for themselves and for all other persons and associations who have contributed funds for the prosecution of this cause, or have otherwise assisted in

such prosecution, and for all who are in privity with said plaintiffs and for all who may lawfully be bound by the acts of said plaintiffs herein (said plaintiffs and all other such persons or association being hereinafter called the parties of the first part) and the Twin Falls North Side Land and Water Company, one of the defendants above named, (hereinafter called the Construction Company,) as follows; viz:

1. The Construction Company will complete its irrigation system in accordance with the terms and conditions of its existing contracts with the State of Idaho, (including the contracts dated January 22, 1916, between the Bondholders' Committee so called, and said State) and when said system shall have been so completed, and such completion shall have been duly certified by the Engineer of said State as provided in said contracts, then and thereupon a full and complete compliance will have been effected as between the Construction Company and said State and as between the Construction Company and the holders of contracts for purchase of its water rights.

2. When its irrigation system shall have been so completed and shall have been accepted by the Board of Land Commissioners of said State then and thereupon the Construction Company will cause to be assigned to the North Side Canal Company, Limited, all of the right, title and interest in and to the Jackson Lake Reservoir, and to all storage

water therein (estimated at 315,000 acre feet), as embodied and set forth in that certain agreement between the United States of America and the Kuhn Irrigation and Canal Company, a Delaware corporation, dated February 25, 1913, a copy of which is now on file in the office of said Board of Land Commissioners, and will at once cause a proper assignment of said last mentioned agreement to be duly executed and placed in escrow in the Pacific National Bank of Boise, Idaho, to be delivered to said Canal Company if and when the foregoing provisions of this paragraph shall have become effective.

3. The Construction Company may sell, and may keep sold as against any cancellation or foreclosures heretofore or hereafter effected, 170,000 shares in the capital stock of said Canal Company, (which shall represent the right upon the part of the holders or purchasers of such shares to irrigate 170,000 acres of land from the irrigation system of the Construction Company,) and may collect the purchase price therefor, upon the understanding, however, that the sales of such stock, aggregating something more than 172,000 shares thereof, heretofore made by the Construction Company, will be adjusted within the limit above provided through the cancellation of sufficient of such shares which have heretofore come under its control, through foreclosure or otherwise.

4. If at any time in the future the Construction Company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve, or can be made to serve, more than 170,000 acres of land, and if the Construction Company is then unable to agree with said Canal Company as to what excess, if any, may be so served, then and in that event, and so often as such may be the case, the Construction Company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judiciously determined; and the question as to where the water must be measured to the contract holder under his contract with the Construction Company, and the question as to how much water must be so measured, as to any excess above said 170,000 acres, are not covered or affected by this stipulation and agreement or by any judgment which may be rendered hereunder.

5. The several contracts between the State of Idaho and the Construction Company and said Bondholders Committee, and the various amendments to said contracts, are now and shall be binding and of full force and effect as between all parties concerned therein, except as the invalidity of any such contract may be pleaded in defense of any suit brought against any individual, but no statement contained in this stipulation and agreement shall be taken in any such suit as evidence of nonperformance by the Construction Company of any

of its obligations, covenants or agreement set forth in its several contracts with the State of Idaho or with any contract holders.

6. The parties of the first part will not collectively or individually, commence any other action, actions or proceedings, before any court or board, for the determination or consideration of any or either of the issues, of law or fact, involved in this action; and this stipulation and agreement, as well as the judgment to be rendered hereunder, may be pleaded or shown in evidence, and shall constitute a complete defense or estoppel in any such action, actions or proceedings.

7. All of the terms and provisions of this stipulation and agreement may be taken by the Court as true and with the force of evidence, for the purpose of any judgment or decree which the Court may deem proper to enter herein and findings of facts and conclusions of law are hereby expressly waived.

8. The Continental and Commercial Trust and Savings Bank, as Trustee, becomes a party to this stipulation and agreement through its attorneys of record in this case for the purpose only of depressing its consent to the entry of judgment hereunder.

Dated December 18, 1917.

R. V. WILCOX,
ADAM B. BARCLAY,
E. M. WOLFE,
GUTHRIE & BOWEN & A. A. FRASER,
As Attorneys for Parties of the First Part

P. S. HADDOCK,
E. A. WALTERS,
COBB, WHEELRIGHT & DILLIE,
As Attorneys for the Construction Company.
HAWLEY & HAWLEY,
As Attorneys for Said Trustee.

EXHIBIT "B"
IN EQUITY

In the District Court of the United States for the District of Idaho, Southern Division.

OLIVER HILL; W. P. RICE; E. C. GLEASON; CLARA T. VEAZIE; H. E. BARRETT; A. A. HOLBROOK; ROMAN M. TISS; LEWIS A. LEINBAUGH; J. F. HOBBS; JOHN T. THORPE,

Plaintiffs

vs.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Defendants

ROBERT ROGERSON, KENNETH McLEOD and BLAINE FURGERSON,

Intervenors

IN EQUITY NO. 544
DECREE

This cause came on to be heard at this term. That permission was given to the above named Intervenors to file their bill in intervention and it was agreed that the material allegations of said bill in intervention were deemed denied by the plaintiff and defendants. Findings of fact and conclusions of law were expressly waived by all parties in open Court. That a stipulation of facts and of settlement of this case and providing for judgment thereon was entered into by the parties hereto and said stipulation presented to the Court and duly considered, whereupon, it was ordered, adjudged and decreed as follows:

I.

That the Construction Company shall complete its irrigation system in accordance with the terms and conditions of its existing contracts with the State of Idaho, (including the contract dated January 22, 1916, between the Bondholders Committee, so called, and said State) and when said system shall have been so completed and such completion shall have been duly certified by the Engineer of said State, as provided in said contracts, then and thereupon a full and complete compliance will have been affected as between the Construction Company and said State and the holders of contracts for the purchase of its water rights.

II.

That when its irrigation system shall have been so completed and shall have been finally accepted by the Board of Land Commissioners of said State, then and thereupon the Construction Company shall cause to be assigned to the North Side Canal Company, Limited, all of the right, title and interest in and to the Jackson Lake Reservoir, and to all storage water, therein (estimated at 315,000 acre feet), as embodied and set forth in that certain agreement between the United States of America and the Kuhn Irrigation and Canal Company, a Delaware Corporation, dated February 25, 1913, a copy of which is now on file in the office of said Board of Land Commissioners, and shall at once cause a proper assignment of said land mentioned agreement to be duly executed and placed in escrow in the Pacific National Bank of Boise, Idaho, to be delivered to said Canal Company, if and when the foregoing provisions of this paragraph shall have become effective.

III.

That the Construction Company may sell, and may keep sold as against any cancellations or foreclosures heretofore or hereafter effected, 170,000 shares in the capital stock of said Canal Company, (which shall represent the right upon the part of the holders or purchasers of such shares to irrigate 170,000 acres of land from the irrigation system

of the Construction Company), and may collect the purchase price therefor, upon the understanding, however, that the sales of such stock aggregating something more than 172,000 shares thereof, heretofore made by the Construction Company shall be adjudged within the limit above provided through the cancellation of sufficient of such shares which have heretofore come under its control, through foreclosure or otherwise.

IV.

That, if at any time in the future the Construction Company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve, or can be made to serve, without violating the settlers' contracts, more than 170,000 acres of land, and if the Construction Company is then unable to agree with said Canal Company as to what excess, if any, may be so served, then and in that event, and so often as such may be the case, the Construction Company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judicially determined; and the question as to where the water must be measured to the contract holder under his contract with the Construction Company, and the question as to how much water must be so measured, thereunder for the purpose of determining what acreage may be irrigated above said 170,000 acres, are not covered or affected by this decree.

V.

That the several contracts between the State of Idaho and the Construction Company and said Bondholders Committee, and the various amendments to said contract, are now and shall be binding and of full force and effect as between all parties concerned therein, except as the invalidity of any such contract may be pleaded in defense of any suit brought against any individual, but no statement contained in said stipulation and agreement or this decree shall be taken in any such suit as evidence of non-performance by the Construction Company of any of its obligations, covenants or agreements set forth in its several contracts with the State of Idaho or with any contract holder.

VI.

Each party hereto shall pay his own costs.

Dated at Boise, Idaho, this 20th day of December, 1917.

FRANK S. DIETRICH,
District Judge

EXHIBIT "C"

Contract No. 152.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY
AGREEMENT

THIS AGREEMENT, Made in duplicate this eighth day of July, 1907, between the Twin Falls

North Side Land and Water Company (for convenience hereinafter called "the Company"), a corporation organized and existing under the laws of the State of Delaware, party of the first part, and Fred Waite (for convenience hereinafter called "the purchaser") of Pocatello, State of Idaho, party of the second part, witnesseth:

That the Company has heretofore entered into a contract with the State of Idaho, acting by its State Board of Land Commissioners, whereby the Company bound itself to construct a system of canals and irrigation works for the reclamation and irrigation of certain lands therein described and referred to, which contract is of record in the office of the Register of the State Board of Land Commissioners at Boise City, Idaho.

That the Company has heretofore entered upon the work of construction of said irrigation system for the purpose of diverting from Snake River the waters thereof under the appropriation of the Twin Falls Land and Water Company by J. H. Lowell, Secretary, made October 11, 1900, recorded in Book 1 of Water Rights, at page 230, Lincoln County, Idaho, records, together with other water rights taken for use on the lands hereinafter described.

That the State Board of Land Commissioners, pursuant to law and its rules and regulations, has notified the Company that it may proceed to sell or contract rights to the use of water flowing and to flow through the canals, and rights to and in

said system of irrigation works, pursuant to law and to the terms of said contract with the State.

That the purchaser has made application to the Company to be permitted to purchase, upon the terms hereinafter set forth, the rights and privileges by said contract guaranteed, to the extent hereinafter named, which said application has been accepted by the Company subject to the approval of the State Board of Land Commissioners, whose approval, previous to the delivery hereof, has been by its Register endorsed hereon.

That in consideration of the sum of One Hundred Twenty & 00/100 Dollars, cash in hand paid this day by the purchaser to the Company and in consideration of the covenants and agreements hereinafter contained it is agreed that in pursuance of the contract between the Company and the State hereinafter called the State Contract that the purchaser shall become entitled to Forty (40) shares of the capital stock of the North Side Canal Company, Limited, the certificate thereof to be in the form as follows, to-wit:

NORTH SIDE CANAL COMPANY, LIMITED

40 Shares. July 8th, 1907

This is to certify Fred Waite, Pocatello, Idaho, is the owner of Forty (40) shares of the capital stock of the North Side Land Company, Limited.

This certificate entitles the owner thereof to receive one-eightieth of a cubic foot of water per

acre per second of time for the following described land: N. E. ¼ of the S. E. ¼—2-10-18, in accordance with the terms of the contract between the State of Idaho and the Twin Falls North Side Land and Water Company and this certificate also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls North Side Land and Water Company, based upon the number of shares finally sold, in accordance with the said contract between the said company and the State of Idaho.

....

By..

President

Attest:

....

Secretary

Said certificate to be delivered as provided for in said State Contract and under the conditions therein stated.

The water which the purchaser shall have the right to conduct and receive through the said canal system shall be used upon and the water shall become dedicated and be appurtenant to the following described land and no other, to-wit:..

....

North East Quarter of the South East Quarter (NE. ¼-SE. ¼) in Section Two (2) of Township Ten (10) South of Range Eighteen (18) East,

containing Forty (40) acres in Lincoln County, Idaho.

And the parties hereto expressly agree as follows, to-wit:

1. This agreement is made in accordance with the provisions of said contract between the State of Idaho and the Company, which, together with the laws of the State of Idaho under which this agreement is made, shall be regarded as defining the rights of the respective parties. And shall regulate the provisions of the shares of stock to be issued to the purchaser by the North Side Canal Company, Limited.

2. The Company agrees that so long as it retains control of the North Side Canal Company, Limited, to-wit: so long as it shall continue to vote a majority of the stock of said Company, as provided by the State Contract, that it will cause said Company, to keep and maintain the said irrigation system in good order and condition and to cause any necessary repairs thereto to be made as soon as practicable and expedient.

Said North Side Canal Company, Limited, is to have power to levy all necessary tolls, charges and assessments upon all users of water in proportion to their respective holdings of stock, whether water is used or not and the Company hereby agrees that no charges shall be made for the delivery of water from this date until after the 1st day of January, 1909, and that thereafter the annual charge for

maintenance shall not, while the Company is in control of the said North Side Canal Company, Limited, exceed the sum of 35 cents for each and every acre to be charged against the entire acreage entered irrespective of the irrigation thereof. The purchaser agrees to pay said charges at the office of the North Side Canal Company, Limited, on the first day of April of each year without notice.

3. The consideration for the water rights hereby agreed to be conveyed is the sum of $1200.00, and the balance thereof remaining due after the cash payment herein before acknowledged, to-wit: the sum of $1080.00, is due and payable as follows, to-wit:

	Due		Principal	Interest	Amount
First Deferred Payment	April 1,	1909	$ 80.00	$64.80	$144.80
Second Deferred Payment	"	1910	80.00	60.00	140.00
Third Deferred Payment	"	1911	80.00	55.20	135.20
Fourth Deferred Payment	"	1912	80.00	50.40	130.40
Fifth Deferred Payment	"	1913	120.00	45.10	165.10
Sifth Deferred Payment	"	1914	120.00	38.40	158.40
Seventh Deferred Payment	"	1915	160.00	31.20	191.20
Eighth Deferred Payment	"	1916	160.00	21.60	181.60
Ninth Deferred Payment	"	1917	200.00	12.00	212.00
Tenth Deferred Payment	....	....	....	....	....

Interest from April 1, 1908, at 6 per cent per annum shall be paid annually but if interest is not paid within thirty days from the date the same falls due then in such case it shall be computed for the entire period at the rate of eight per cent per annum.

4. The purchaser hereby covenants and agrees that upon default in the payment of any of the payments above specified, or of the interest thereon,

or any annual charge, toll or assessment, for the operation and maintenance of the irrigation system hereinbefore provided for, the Company may declare the entire amount of the principal purchase price for said water right due, and may proceed either in law or equity to collect the same, and to enforce any lien which it may have upon the water rights hereby contracted, or upon the lands to which said water rights are dedicated or may at its option proceed to enforce any remedy given by the laws of Idaho to the Company against the purchaser.

And the purchaser hereby further covenants that he will and by these presents does hereby assign, transfer and set over by way of mortgage or pledge to the Company to secure the payments of the amounts due and to become due on the purchase price of the water right hereby contracted to be sold and all interest, tolls and charges herein provided for, any and all rights which he now has or which may hereafter accrue to him under his contract with the State of Idaho, for the purchase of the lands to which the water rights hereby contracted for are dedicated, and further that immediately upon transfer to him of the legal title to said lands or any part thereof, he will, upon demand, execute to the Company, in proper form, a mortgage or deed of trust with power of sale in such form as may be approved by the State Board of Land Commissioners to secure the performance by him of the provisions of this contract, which said mortgage the purchaser

hereby covenants and agrees shall be a first lien upon the lands so mortgaged, superior to any land every incumbrance in favor of any persons whomsoever.

5. The purchaser agrees that the shares of stock purchased in the North Side Canal Company, shall be and they are hereby assigned and transferred to the Company and said Company and its agents are hereby authorized and empowered to vote said stock in such manner as it or its agents may deem proper at all meetings of the stockholders of said Company until 35 per cent of the purchase price of said stock has been paid.

6. It is agreed that no water shall be delivered to the purchaser from said irrigation system while any installment of principal or interest is due and unpaid from the purchaser to the Company or while any toll or assessment is due and unpaid from the purchaser to the North Side Canal Company, Limited.

7. This contract may be assigned by the Company and thereupon the payment of principal and interest if so provided shall be due and payable to the assignee but the payment for tolls, assessments and charges for the delivery of water shall, unless otherwise provided, be paid to the North Side Canal Company, Limited, and payment thereof may be enforced by it.

8. This contract is made pursuant to and subject to the Contract between the Company and the

State of Idaho and the existing laws of said State.

9. All notices given to second party by the State Board of Land Commissioners or by the first party hereto may be sent to second party by mail addressed to Pocatello, Idaho.

IN WITNESS WHEREOF, The parties have hereunto subscribed their names, and the Company has caused its seal to be affixed the day and year above written in duplicate.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY,
By D. C. MACWATTERS,
Vice-President
FENTRESS HICE,
(SEAL) *Ass't. Secretary*
FRED WAITE.

I hereby certify that the above is a true copy of the original contract in the above matter.

Attest: FENTRESS HICE.

C. M. HAPGOOD, *Ass't. Secy. Twin Falls North Side Land & Water Co.*
E. C. KIERSTED,
Witnesses.

The foregoing contract is hereby approved, and has been registered this 30th day of July, 1907.

STATE BOARD OF LAND COMMISSINERS,
By M. I. CHURCH,
Register

For value received this contract, principal and interest, is hereby assigned and transferred to ...., by authority of a resolution of the Board of Directors of the Twin Falls North Side Land and Water Company.

TWIN FALLS NORTH SIDE LAND AND WATER CO.,

By..

EXHIBIT "D"

Incorporated Under the Laws of the State of Idaho.

No. 243. 40.00 Shares

NORTH SIDE CANAL COMPANY

Limited

CAPITAL STOCK $200,000.00

Par Value of Shares, One Dollar.

Principal Place of Business, Jerome, Idaho.

Jerome, Idaho, Oct. 10, 1914

THIS IS TO CERTIFY That D. L. McClung is the owner of Forty and no/100 (40.00) Shares of the Capital Stock of the North Side Canal Company, Limited. This CERTIFICATE entitles the owner thereof to receive one-eightieth of a cubic foot of water per acre per second of time for the following described land: North-East Quarter of the South-East Quarter, (NE¼ SE¼), Sec. Two (2), Twp. Ten (10) S., of R. Eighteen (18) East B. M., in accordance with the terms of the contract between the State of Idaho and the Twin Falls North Side Land and Water Company.

AND THIS CERTIFICATE Also entitles the owner to a proportionate interest in the dam, canal, water rights and all other rights and franchises of the Twin Falls North Side Land and Water Company, based upon the number of shares finally sold, in accordance with the said contract between the said Company and the State of Idaho.

IN WITNESS WHEREOF, The said Corporation has caused its corporate name and seal to be hereto affixed.

NORTH SIDE CANAL COMPANY, Limited.
By D. C. MACWATTERS,
(SEAL) *President*
Attest: HARVEY W. HURLEBAUS,
Secretary

(Service acknowledged Dec. 2, 1927,
by E. A. Walters.)

(Title of Court and Cause.)

OBJECTION TO APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL BILL IN INTERVENTION.

COME now the defendants in the above entitled case and oppose the motion of D. L. McClung for permission to file a supplemental bill in intervention in the above entitled case, and moved the Court for an Order denying the said McClung permission to file said supplemental bill, all upon the following grounds and for the following reasons:

1. That the Court has no jurisdiction over the matters and things sought to be litigated in the proposed supplemental bill in intervention for the reason that,

(a) Final Judgment was entered in this action almost ten years prior to the filing of said McClung's motion and no jurisdiction of the case was retained by the Court in the final judgment entered in this cause, and

(b) The proposed supplemental bill in intervention reveals on its face that it presents to the Court a different cause of action from that set forth in the original complaint herein or in the bill in intervention heretofore filed herein, and a cause of action involving different parties from those who were parties to the original bill of complaint herein and/or original bill of intervention, and

(c) That said McClung was not a party to, and is not a successor in interest of any party to, the said original action.

2. That the identical question sought to be litigated by the intervenor McClung if his proposed supplemental bill in intervention is allowed to be filed herein, is at present being litigated in another action which is pending in the District Court of the

Eleventh Judicial District of the State of Idaho, in and for the County of Jerome, wherein the said D. L. McClung is plaintiff and the defendant herein, the Twin Falls North Side Land & Water Company, a corporation, is defendant, together with other defendants, and in which action, the sole relief sought is to prevent the defendant here, the Twin Falls North Side Land & Water Company, from selling shares of stock and/or water rights in the North Side Canal Company, Limited, in excess of 170,000 acres; that said action in said State District Court is at issue and stands ready for trial upon the docket of said District Court and is at the present time, and was at the time of the filing of the said McClung's motion, pending there, undetermined, and that the said proposed supplemental bill in intervention is merely a duplication of the complaint filed in said State Court and can only present for trial the same issues already presented in said action in said State Court and can and will only result in a multiplicity of suits over the same subject matter.

3. That the relief sought by the proposed supplemental bill in intervention is not germane to the original bill of complaint in this action or the original bill in intervention in this action or either of them; and that it is not supplemental thereto nor designed to cure some oversight or change in situation, but is an attempt to inject into, and litigate, an entirely new, separate and different cause of

action from that presented by the original bill of complaint and/or the original bill in intervention herein.

4. That the matter actually sought to be presented to the Court by the proposed supplemental bill is not fully or fairly stated in the proposed bill; that as a matter of truth and fact the former decree in this action, after fixing the limit of water stock or water rights to be sold by the defendant on the North Side Project at 170,000 shares or acres, continued with the following language:

> "That, if at any time in the future the Construction Company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve, or can be made to serve, without *viliating* the settlers' contracts, more than 170,000 acres of land, and if the Construction Company is then unable to agree with said Canal Company as to what excess, if any, may be so served, then and in that event, and so often as such may be the case, the Construction Company, its successors or assigns, may bring an action in any Court of competent jurisdiction to have said question judicially determined; and the question as to where the water must be measured to the contract holder under his *contract* with the Construction Company, and the question as to how much water must be so measured, thereunder for the purpose of determining what acreage

may be irrigated above said 170,000 acres, are not covered or affected by this decree."

That pursuant to the express language of said portion of said decree above quoted, the defendant herein, (which is the company referred to as the "Construction Company" in the said decree) entered into an agreement with the North Side Canal Company, Limited, (which is the Company referred to as the "Canal Company" in said decree) after the said Canal Company had been expressly authorized so to do by a vote of its stockholders, including the said McClung and his alleged class, entered into an agreement in writing wherein and whereby it was mutually agreed that the limit of 170,000 shares or acres of water rights fixed by the said former decree in this action, should be changed or altered pursuant to the specific terms of said decree and a new limit of 185,000 acres was fixed.

That the defendant Twin Falls North Side Land & Water Company, herein has not sold, and it is not alleged in the proposed supplemental bill in intervention that is has sold, any water rights in excess of the said figure of 185,000 shares or acres, as fixed in said agreement; and that the said McClung knows, and by his proposed supplemental complaint in intervention is concealing from the Court, the fact that defendant has not violated said former decree as altered by the parties by the agreement aforesaid, and that the only question sought to be presented now is the validity of the said written

agreement made pursuant to said former decree, which is a question entirely foreign to and different from, any question presented in the original bill of complaint herein, or in the original complaint in intervention herein.

5. That the North Side Canal Company, Limited, an Idaho corporation, the State of Idaho, and the Twin Falls North Side Land & Water Company are parties to said settlement agreement and that the said North Side Canal Company, Limited, and the said State of Idaho are necessary parties in any litigation concerning the same.

6. That if the validity of said settlement agreement is to be litigated, said North Side Canal Company, Limited, and the State of Idaho will necessarily be parties defendant to the proposed supplemental bill and that when they are so joined, there will not be a diversity of citizenship between the plaintiff and the necessary defendants and that, therefore, this Court has not jurisdiction of the controversy sought to be presented by the said supplemental bill.

That this objection and motion is made upon all of the records and files of this action and the affidavit of E. A. Walters, with the exhibits thereto attached, which is attached to this objection and by reference made a part hereof.

DATED this 19th day of December, 1927.

WALTERS AND PARRY,
Attorneys for the Defendants

In the District Court of the United States for the District of Idaho, Southern Division.

OLIVER HILL; W. P. RICE; E. C. GLEASON; CLARA T. VEAZIE; H. E. BARRETT; A. A. HOLBROOK; ROMAN M. TISS; LEWIS A. LEINBAUGH; J. F. HOBBS; JOHN T. THORPE,

Plaintiffs

vs.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Defendants

ROBERT ROGERSON, KENNETH McLEOD and BLAINE FURGERSON,

Intervenors

AFFIDAVIT OF E. A. WALTERS

STATE OF IDAHO,)
) ss.
County of Twin Falls,)

E. A. WALTERS, being first duly sworn, deposes and says:

That he is one of the attorneys for the defendant herein and has been at all times since the inception of this action, and that during such time, he has been one of the attorneys for the defendant Twin Falls North Side Land & Water Company, a corporation; that on or about the 8th day of November,

1921, there was filed in the District Court of the Eleventh Judicial District of the State of Idaho, in and for the County of Jerome, an action by D. L. McClung as plaintiff, being the same person as the D. L. McClung who now asks leave to file a supplemental bill in intervention in this action; the defendants therein being the defendant in this action, The North Side Canal Company, Limited, an Idaho Corporation, and the State of Idaho and certain of the officials of said State; that a true and correct copy of the complaint in said action with exhibits attached thereto is hereto attached marked "Exhibit A" and by reference made a part hereof; and that a true and correct copy of the answer filed in said action is hereto attached marked "Exhibit B" and by reference made a part hereof.

That said action stands at issue and ready for trial upon the docket of the said last above mentioned State Court and is pending there undetermined at the present time.

E. A. WALTERS.

SUBSCRIBED AND SWORN to before me this 19th day of December, 1927.

MAY COOK,

(SEAL) Notary Public, residing at
Twin Falls, Idaho.

(Original exhibits that were attached are forwarded.)

Endorsed: Filed Dec. 20, 1927.

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause)

MEMORANDUM DECISION

Feb. 6, 1928.

J. B. Eldridge, Attorney for Supplemental Complainant, D. L. McClung.

Walters & Parry, Attorneys for Defendants.

CAVANAH, DISTRICT JUDGE:

During the years 1901, 1907 and 1908, the State of Idaho, in pursuance of an Act of Congress commonly known as the Carey Act, and the laws of the State, acting through its proper officials, entered into certain contracts wherein it agreed to procure the construction of a certain irrigation system to divert the waters of the Snake River sufficient to irrigate and reclaim more than 200,000 acres of land, which included the lands of the plaintiffs and the supplemental complainant D. L. McClung, and in what is known as the North Side Project. Thereafter, in accordance with the contracts, the State entered into certain other contracts with the defendant Twin Falls North Side Land & Water Company, providing for the construction by the defendant company of the irrigation works and the initiation of water rights for the reclamation of the lands. The defendant company, acting in accordance with the Act of Congress and the laws of the State, and its contracts with the State, contracted with certain

settlers desiring to enter lands within the North Side Project, wherein it agreed to sell to the entrymen an interest in the irrigation works and the water rights to be diverted by the system.

In 1917, in an action brought in this court by the same plaintiffs against the defendants, a decree by stipulation was entered, relating, among other things, to the selling of a number of shares of stock in the defendant company, and it was therein provided that if at any time in the future the company shall conclude that the irrigation system and its water supply will serve and can be made to serve, without violating the settlers' contracts, more than 170,000 acres of land, and it is unable to agree with the Canal Company, in which the supplemental complainant is a shareholder, as to what excess over the 170,000 acres may be served, then the defendant company may bring an action in any court of compepetent jurisdiction to have the question determined.

After the decree was rendered, and in the year 1921, the question arose as to whether the defendant company could sell 185,000 shares of the capital stock of the Canal Company which represented its right to sell water rights for the irrigation of 185,000 acres of land and which was 15,000 shares of stock in addition to the 170,000 then sold and outstanding. The North Side Canal Company, representing its stockholders, of which the supplemental complainant is one, the State of Idaho, and the defendant company, then entered into a contract

in which they recited the provision of the Court's decree relating to the manner of determining the sale of the stock for water in excess of the 170,000 acres of land, and therein agreed that the irrigation system and the then water supply was sufficient to irrigate and reclaim 185,000 acres of land without violating the terms of the settlers' contracts. The right was there given to the defendant company to sell and keep sold 185,000 shares of the capital stock of the Canal Company. So the provision of the decree in the original action in that respect was complied with when the parties interested agreed to allow the company to sell and dispose of the 15,000 shares of stock in addition to the stock then sold and outstanding. After this agreement was made the supplemental complainant McClung instituted an action in the State Court against the defendant company and others, which is pending and is at issue, and in which the same issue is involved as to the right of the defendant company to sell the additional 15,000 shares of stock under the decree of the Court. Apparently not being content with the action pending in the State Court, he now moves this Court for an order permitting him to file his supplemental bill of complaint in the original action in which the decree in question was rendered, and tenders a supplemental bill praying for an order restraining the defendant company from selling any further water rights out of the water supply available at the time the decree was

entered, and requiring the completion of the irrigation system.

The defendants objected to the application for permission to file a supplemental bill, and urges that the Court has no jurisdiction over the matters sought to be litigated in the proposed supplemental bill, for the reason that a final judgment was rendered in this action ten years ago, and no jurisdiction of the case was retained by the court in the final judgment; that the proposed supplemental bill reveals that it presents a different cause of action from that set forth in the original complaint, and a cause of action involving different parties from those who were parties to the original complaint, and that McClung was not a party to and is not a successor in interest of any party to the original action. Attached to the objection of the defendants is the affidavit of their counsel, stating that the action referred to is now pending in the State Court, and that the exhibits attached thereto, containing copies of the various contracts, the decree in the final action and the pleadings, with its exhibits, are true and correct. Upon the other hand, the supplemental complainant contends that his application is for the purpose of carrying into execution the decree of this court rendered in the original suit, and that the Court has not relinquished jurisdiction in its enforcement. It would seem from an examination of the decree of the court in the original action that the court retained jurisdiction in carrying out the

decree in the event the parties could not agree upon allowing defendant company to sell and dispose of water rights in excess of 170,000 shares, by authorizing the institution of an action to determine such right in any court of competent jurisdiction which would permit such an action to be brought. This permission is expressly stated in the decree, but the record upon this motion contains an agreement made by the proper parties, in which they agreed that the defendant company could sell the additional 15,000 shares of its stock, and further agreed that there was then a sufficient supply of water to meet the requirements of the total 185,000 shares of stock, and that the Canal Company could adequately divert it. By entering into this agreement they took the steps prescribed in the decree, and thereby removed the necessity of bringing an action in this Court to determine the question involved here. It will be remembered that the agreement upon which the original decree is based, and the decree itself, recognizes that at the time the decree was rendered on December 20, 1917, the canal system was not complete, and the limitation of 170,000 acres, stated in the decree, was the acreage of water rights sold at that time, and the reason for inserting in the agreement and the decree the clause referred to was to allow the Land & Water Company, when it increased the capacity of the irrigation system, to sell and dispose of stock in excess of 170,000 shares then out-

standing in such amount as would meet the increased capacity and water supply.

The intent and purpose of the proposed bill in intervention is to present for determination the right of the defendant company to sell an additional 15,000 shares of stock and to attempt to divert the water through the canal system, which it is claimed is inadequate and incomplete. There is no dispute as to the execution of the agreement referred to. It would seem that at the present time there is no question under the decree to be adjudicated, as the parties have agreed in the manner directed in the decree. The court in rendering its decree in the original suit authorized the parties to determine the request of the defendant company for the right to sell and dispose of the additional shares of stock in one of two ways: First by agreement of the parties, and second, in case they are unable to agree, an action may be brought in any court of competent jurisdiction. The North Side Canal Company, representing its stockholders, among whom was the supplemental complainant McClung, and his predecessor in interest, complied with the decree by entering into the agreement allowing the defendant company to sell the additional 15,000 shares of stock in question, and asserted therein that there was a sufficient water supply and that the canal system was adequate to divert it.

The further request in the proposed bill that the defendant company be required to complete the irri-

gation system is answered by the provisions in the decree and the agreement of the parties, entered into in July, 1921. It is provided in the decree "that the Construction Company shall complete its irrigation system in accordance with the terms and conditions of its existing contracts with the State of Idaho, (including the contract dated January 22, 1916, between the Bondholders' Committee, so called, and said State) and when said system shall have been so completed, and such completion shall have been duly certified by the Engineer of said State, as provided in said contracts, then and thereupon a full and complete compliance will have been effected as between the Construction Company and said State and as between the Construction Company and the holders of contracts for the purchase of its water rights." And in the agreement it is provided that "since the date of said decree, the capacity of said canal system and its efficiency have been greatly increased, a considerable portion of which work was not required by said State contracts, but was performed by the Land and Water Company without contract requirement for the purpose of making it possible to increase the area that could be reclaimed, and to the end that the Land and Water Company might sell and keep sold more than 170,000 shares of the capital stock of the Canal Company as provided in said paragraph four of said decree * * * : and, whereas, said work of canal enlargement and improvement has been completed, including an in-

creased right in the Milner Diversion Dam, by means of which about 500 second feet of additional water can now be diverted into said canal system; and, whereas, it has been determined and ascertained by the parties hereto, and so agreed, that said irrigation system and the present water supply therefor can, without violating the terms or provisions of the setttlers' contracts, irrigate 185,000 acres of land."

It will be observed that the decree provides that the defendant company, who was designated in the decree as the "construction company," shall complete its irrigation system in accordance with the terms and conditions of its existing contracts with the State and others, and when the completion of the system shall have been certified by the Engineer of the State, as provided in the contracts, then a full and complete compliance will have been effected as between it and the State and the holders of contracts for the purchase of water rights. The Court in the decree has said that when the certification of the State Engineer is made as to the completion of the system, a full and complete compliance with the contracts will have been effected. This requirement of the decree was recognized and admitted by the parties, as we find in the clause quoted from the agreement the statement that since the decree the capacity of the canal system and its efficiency have been greatly increased to such an extent that the Land and Water Company might sell and keep sold

more than 170,000 shares of stock of the Canal Company as provided in the decree; that the work of canal enlargement and improvement has been completed to the extent that about 500 second feet of additional water can be diverted into the canal system, and that it had then been determined and ascertained by the parties, and so agreed, that the system, and the present water supply therefor, can, without violating the terms of the settlers' contracts, irrigate and reclaim 185,000 acres of land. It further appears that the system was, on August 6, 1920, accepted as completed according to the contract, by the State and for and on behalf of the North Side Canal Company.

The controversy between supplemental complainant McClung, a stockholder of the North Side Canal Company, the defendant company, and the State, as to whether or not the agreement of July 27, 1921, referred to, was fraudulent or unwise, has no relation and is not germane to the original bill and decree, for if a stockholder feels that his company has jeopardized his rights in entering into the agreement in question, he can avail himself of the remedy provided by law in a proper action, and bring in all of the parties to the contract.

It follows from the conclusion here reached that the motion for permission to file the proposed bill is denied.

Endorsed: Filed Feb. 6, 1928.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

ORDER DENYING APPLICATION TO FILE SUPPLEMENTAL BILL OF COMPLAINT.

Upon consideration, and in harmony with Memorandum Decision this day filed,

IT IS ORDERED, that the motion for permission to file proposed supplemental bill of complaint be and the same is hereby denied, without prejudice.

Dated: Boise, Idaho, February 6, 1928.

(Signed) CHARLES C. CAVANAH,
District Judge

Endorsed: Filed Feb. 6, 1928.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

NOTICE OF MOTION

The above named defendants and to the intervenors and to E. A. Walters, Esq., and to E. M. Wolfe, Esq., their attorneys of record.

You and each of you will please take notice that the supplemental complainant, D. L. McClung, will move the court at the court-room of the Federal Building in Boise, Idaho, on the 11th day of September, 1928, at the hour of 10:00 o'clock a. m. of said day, or as soon thereafter as counsel may be heard, to make an order permitting the supplemental complainant, D. L. McClung, to file his supplemental complaint, herein copy of which is at-

tached to the motion, motion and copy of supplemental complaint being hereto attached and made a part thereof.

That said motion will be made upon the supplemental bill of complaint of D. L. McClung and upon the original pleadings, papers, records and files in said cause.

J. B. ELDRIDGE,
Attorney for Supplemental
Complainant, D. L. McClung,
Residence, Boise, Idaho.

Endorsed: Filed August 29, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

MOTION

Comes now the supplemental complainant, D. L. McClung, and moves the Court for an order permitting the supplemental complainant to file his supplemental bill of complaint for the reasons and upon the grounds set forth in said supplemental bill of complaint, copy of which is hereto attached and made a part hereof.

J. B. ELDRIDGE,
Attorney for Supplemental
Complainant, D. L. McClung.
Residence, Boise, Idaho.

Endorsed: Filed Dec. 7, 1927.
W. D. McREYNOLDS, Clerk.
By Verna Thayer, Deputy.

(Title of Court and Cause)

SUPPLEMENTAL BILL IN EQUITY

COMES NOW D. L. McCLUNG and for SUPPLEMENTAL BILL IN EQUITY alleges and states:

I.

That on the 13th day of April, 1916, Oliver Hill and others filed their Amended Bill of Complaint in said cause, to which reference is hereby made and by such reference made a part hereof.

II.

That on December 20, 1917, pursuant to motion theretofore made, Robert Rogerson and others filed their Bill of Intervention in said cause December 20, 1917, to which reference is hereby made and by such reference made a part hereof.

III.

That on December 20, 1917, Stipulation between all said litigants was filed for decree, copy of which marked EXHIBIT "A" is hereto attached and made a part hereof.

IV.

That decree was entered on December 20, 1917, in said cause, copy of which marked EXHIBIT "B" is hereto attached and made a part hereof.

V.

That your complainant herein was at the time of the filing of the original and said Amended Bill and Bill in Intervention, Stipulation and Decree, and is now the owner of the following described land, to-wit: The Northeast quarter of the Southeast quarter and the Southeast quarter of the Northeast quarter of Section Two, Township Ten South, Range 18 East, Boise Meridian, Jerome County, State of Idaho, situate upon and as a part of Northside Irrigation Project and the owner of the right to receive one-eightieth second foot for each acre of land under what is known as first segregation contract as set forth in said Amended Bill and was one of the parties on whose behalf said cause was prosecuted and maintained, and on whose behalf said stipulation was signed and on whose behalf said decree was rendered.

VI.

That on or about the months of April and July, 1907, respectively, one Fred Waite, the predecessor in interest of your supplemental complainant, entered into his certain water right contracts with Twin Falls North Side Land and Water Company,

said contracts being of the same kind and character as the settlers' contracts set forth and described in the Amended Bill and the Bill in Intervention in this cause wherein and whereby a water right was acquired for the lands belonging to this supplemental complainant described as aforesaid:

That subsequently stock certificates in North Side Canal Company were issued to supplemental complainant herein, copies of one of said contracts and certificates marked EXHIBITS "C" and "D" are hereto attached and made a part hereof, said contract and stock certificate being of the same character and import as issued to all settlers under said project.

VII.

That your supplemental complainant has performed all the obligations on his part to be performed under said contracts and hereby offers to do equity and to subject himself to the equitable consideration of the court.

VIII.

That under the terms of said decree the United States District Court for the District of Idaho adjudged and decreed that the several contracts set forth in the Bill of Complaint and their amendments shall remain in full force and effect between all parties concerned therein; that your supplemental complaint is deeply interested in said contracts.

IX.

That said Court adjudged and decreed that the construction company had the right to sell and keep sold 170,000 shares of stock carrying with it the right to irrigate 170,000 acres and no more, and that no other further shares of stock should be sold if by so doing the settlers' contracts would be violated.

X.

That Twin Falls North Side Land and Water Company has made no attempt until within approximately the last few months to sell or dispose of stock in North Side Canal Company, Ltd., in excess of 170,000 shares and has within said time offered for sale and is now offering for sale, and unless restrained and enjoined by order of this Court, will sell stock in excess of 170,000 shares which shares will entitle land in excess of 170,000 acres to receive water for irrigation out of the present water supply of the North Side Canal Company to the injury of complainant and in violation of his contract with said Twin Falls North Side Land and Water Company, then and now in force and in violation of said decree; that the present available water supply furnished by said Land and Water Company for said North Side Canal Company is insufficient to supply the amounts already contracted to be furnished to settlers; that the present capacity of the irrigation system furnished by said Land and Water Company

for said North Side Canal Company is not sufficient to permit of the delivery of the amounts already contracted to be delivered to settlers by said Land and Water Company; that the dependable operating capacity of the system is not more than 3360 second feet and there is a water loss of 40 per cent of making deliveries through said system; and that 3360 second feet of water if available in the system will only furnish and deliver the contract amounts of water to 163,080 acres under said State and settlers' contracts now outstanding.

XI.

That said Twin Falls North Side Land & Water Company, defendant herein, is offering to sell 15,000 shares of stock more representing water for use on 15,000 acres additional lands to be irrigated from the said water supply, and to be irrigated from the canal system belonging to the lands of the North Side Project as aforesaid, which are wholly and notoriously inadequate to furnish water, therefore, in that said system has never been completed in conformity with said decree and that further sale of additional shares of stock and water rights to additional lands as is now proposed and threatened by defendant, Twin Falls North Side Land and Water Company as aforesaid, and in violation of said decree, will cause great and irreparable injury to your Supplemental Complainant posed and threatened by defendant, Twin Falls North Side Land and

Water Company as aforesaid, and in violation of said decree, will cause great and irreparable injury to your Supplemental Complainant and all others similarly situated.

XII.

That there are a large number of water users holding contracts similar to that of your supplemental complainant herein, and on account of the vast numbers interested as your complainant is interested, it would be impracticable to bring them all before the Court and your supplemental complainant brings this supplemental proceeding on behalf of himself and all such persons similarly situated, on whose behalf the Bill in Intervention herein was prosecuted, and decree entered thereon.

That your supplemental complainant and others similarly situated have no plain, speedy and adequate remedy at law.

XIII.

That your supplemental complainant brings this action in aid of said former decree rendered by this court and for the enforcement thereof, and to render said decree operative and effective.

XIV.

That your supplemental complainant and those on whose behalf this action is brought are citizens and residents of the State of Idaho.

XV.

That, for the purpose of avoiding and violating the decree of this court as aforesaid and to avoid the completion of said irrigation works as provided for in said decree, said Twin Falls North Side Land & Water Company wrongfully and unlawfully and fraudulently combined and conspired with W. G. Swendsen, Commissioner of Reclamation of the Department of Reclamation of the State of Idaho wherein and whereby the said W. G. Swendsen wrongfully, fraudulently and in violation of the rights of this supplemental complainant and those similarly situated entered a certain order and finding on the 6th day of August, 1920, copy of which is marked Exhibit "E" and is hereto attached and made a part hereof wherein and whereby the said commissioner of reclamation wrongfully and fraudulently and acting beyond the scope of his authority found and determined that the said irrigation system had been completed and pretended to accept the same so as to bind the stockholders of the North Side Canal Company, including the supplemental complainant herein.

XVI.

That in pursuance of said fraudulent conspiracy to cheat and defraud your supplemental complainant and those similarly situated of their rights to the use of water for which they had bought and paid as aforesaid, said defendant, Twin Falls North

Side Land & Water Company wrongfully and unlawfully combined and conspired with North Side Canal Company and said W. G. Swendsen to violate the terms of the decree of this court as aforesaid, and to that end and for the purpose entered into that certain contract bearing date of the 27th day of July, 1921, a copy of which marked Exhibit "F" is hereto attached and made a part hereof; wherein and whereby said Twin Falls North Side Land & Water Company and said North Side Canal Company, Limited, being then and there under the management and control of R. E. Shepherd, general manager for both said companies, falsely and fraudulently recited in said contract that said irrigation works had been completed and enlarged so that "without violating the provisions of the settlers' contracts" said irrigation works would reclaim 185,000 acres of land and contracted and agreed that 15,000 additional shares of the capital stock of said canal company might be sold representing a water right for 15,000 additional acres of land and falsely and fraudulently recited and provided in said contract that the sale of additional shares as aforesaid shall not be deemed in violation of the provisions of the contracts between the Land & Water Company and the State of Idaho but in compliance therewith; and falsely and fraudulently recited and provided in said contract that said contract should be deemed and considered in compliance with the decree of this court as aforesaid; and false-

ly and fraudulently attempted to stipulate in this suit under and by means of said contract, that said agreement may be deemed

> "a stipulation by and between the parties in said suit for the amendment of said decree as herein recited in so far as applicable."

thereby fraudulently attempting to force this supplemental complainant and those similarly situated into a stipulation in this cause without their knowledge and consent, that the decree of this Court may be deemed amended so as to permit the sale of 15,000 additional shares of stock for 15,000 additional acres of land.

XVII.

That said W. G. Swendsen attempted to bind the State of Idaho and pretended to cause the State of Idaho to agree to the execution of said contract, all of which was in violation of his authority and beyond the scope thereof.

XVIII.

That all of said acts and doings were false and fraudulent and known to be such by said defendants and by said North Side Canal Company, Limited, and said W. G. Swendsen for the reasons hereinbefore stated.

XIX.

That the North Side Canal Company, Limited, of which your supplemental complainant and those

similarly situated are stockholders, is and was without authority to authorize the sale of additional water for the reason of the insufficient supply thereof as aforesaid, and insufficient capacity for in so doing, the water rights or right to the use of water purchased and paid for by your supplemental complainant and those similarly situated, would have to be taken from them and is being taken from them, to the end that said waters may be sold to additional lands as provided for in said contract as aforesaid, Exhibit "F," hereto attached.

XX.

That under the terms of the decree of this Court as aforesaid it was provided, that the said State contracts for the first segregation shall remain in full force and effect and be binding; and that a further sale of water rights as agreed upon as a result of said conspiracy and in pursuance thereof as aforesaid will violate the said State contracts and the settlers' contracts, including that of supplemental complainant and those on whose behalf this action is brought, in that section 8 of the State contract provides:

> "But in no case shall water rights or shares be dedicated to any lands aforementioned or sold beyond the carrying capacity of the canal or in excess of the appropriation of water therefor."

XXI.

That supplemental complainant herein and those on whose behalf this action is brought, has never consented to the further sales of water rights as aforesaid but has at all times protested against the sale of any further water rights.

XXII.

That said contract permitting the further sale of water rights from the water supply available for said North Side Project is void for the further reason that said North Side Canal Company is without power or authority to agree to the further sale of water rights for the reason that no water is available for said lands to be supplied, and that said water has already been sold to and paid for by supplemental complainant and those on whose behalf this action is brought, and belonged to them at the time said contract was made and now belongs to them.

XXIII.

That within a very few months after said contract was entered into for the further sale of said water rights on said project, said conspirators in order to pacify the water users upon said North Side Project engaged in a speech making campaign over said project advising the settlers upon said project to purchase approximately one hundred and sixty thousand acre feet of water for use upon the

lands of said North Side Project as a supplemental water supply, on account of the extreme shortage of water upon said project, and the dire necessity for an added water supply for the lands already under irrigation at said time and at the time of the entering into said wrongful and unlawful contract as aforesaid from American Falls water supply and said additional supplemental water supply was so purchased.

WHEREFORE supplemental complainant prays:

First.

That an order of this court be issued permitting supplemental complainant to file his supplemental bill herein.

Second.

That defendant, Twin Falls North Side Land and Water Company be restrained and enjoined permanently from the sale of any further water rights to be supplied under said State and settlers' contracts, out of the water supply available at the time said decree was entered and restrained and enjoined from the sale of any further water or water to be carried through said canal as now constructed.

Third.

That Twin Falls North Side Land and Water Company be required to complete said irrigation system in conformity with said contracts.

Fourth.

That if the Court shall find it expedient and necessary, that the court appoint a party to take charge of said irrigation works and complete the same at the expense of said Twin Falls North Side Land and Water Company, so as to make possible the delivery of the contracted amounts of water for 170,000 acres to the end that the settlers' contracts shall not be violated.

Fifth.

That if it be deemed necessary for the bringing in of North Side Canal Company, Limited, a corporation, then an order to that effect be entered and said North Side Canal Company, Limited, be made a party defendant herein and that an order for process and service be issued accordingly.

Sixth.

That your supplemental complainant and those similarly situated have such other and further relief as to the Court may appear just in the premises.

J. B. ELDRIDGE,
Attorney for Supplemental Complainant.
Residence, Boise, State of Idaho.

STATE OF IDAHO)
) ss.
County of Jerome,)

D. L. McClung being first duly sworn deposes and says: That he is the supplemental complainant in

the above entitled cause and has read the within and foregoing supplemental bill of complaint and known the contents thereof, that he believes the facts stated in the pleadings to be true.

D. L. McCLUNG.

Subscribed and sworn to before me this the 7th day of May, 1928.

JAMES C. KNOTT,
Notary Public.
(SEAL) Residing at Eden, Idaho.
My commission expires Sept. 8, 1931.

(Title of Court and Cause)

IN EQUITY
No. 544.

STIPULATION SETTLING CASE AND FOR JUDGMENT.

For the purpose of effecting a complete and final settlement of the above entitled action, and of all the issues and differences set forth or involved therein, it is hereby stipulated and agreed by and between the plaintiffs above named, acting for themselves and for all other persons and associations who have contributed funds for the prosecution of this cause, or have otherwise assisted in such prosecution, and for all who are in privity with said plaintiffs and for all who may lawfully be bound by the acts of said plaintiffs herein (said plaintiffs and all others such persons or association being herein-

after called the parties of the first part) and the Twin Falls North Side Land and Water Company, one of the defendants above named, (hereinafter called the Construction Company), as follows: viz:

1. The Construction Company will complete its irrigation system in accordance with the terms and conditions of its existing contracts with the State of Idaho, (including the contract dated January 22, 1916, between the Bondholders' Committee so called, and said State) and when said system shall have been so completed, and such completion shall have been duly certified by the Engineer of said State as provided in said contracts, then and thereupon a full and complete compliance will have been effected as between the Construction Company and said State and as between the Construction Company and the holders of contracts for purchase of its water rights.

2. When its irrigation system shall have been so completed and shall have been accepted by the Board of Land Commissioners of said State then and thereupon the Construction Company will cause to be assigned to the North Side Canal Company, Limited, all of the right, title and interest in and to the Jackson Lake Reservoir, and to all storage water therein (estimated at 315,000 acre feet), as embodied and set forth in that certain agreement between the United States of America and the Kuhn Irrigation and Canal Company, a Delaware corporation, dated February 25, 1913, a copy of which is now on file

in the office of said Board of Land Commissioners, and will at once cause a proper assignment of said last mentioned agreement to be duly executed and placed in escrow in the Pacific National Bank of Boise, Idaho, to be delivered to said Canal Company if and when the foregoing provisions of this paragraph shall have become effective.

3. The Construction Company may sell, and may keep sold as against any cancellations or foreclosures heretofore or hereafter effected, 170,000 shares in the capital stock of said Canal Company, (which shall represent the right upon the part of the holders or purchasers of such shares to irrigate 170,000 acres of land from the irrigation system of the Construction Company,) and may collect the purchase price therefor, upon the understanding, however, that the sales of such stock, aggregating something more than 172,000 shares thereof, heretofore made by the Construction Company, will be adjusted within the limit above provided through the cancellation of sufficient of such shares which have heretofore come under its control, through foreclosure or otherwise.

4. If at any time in the future the Construction Company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve, or can be made to serve, more than 170,000 acres of land, and if the Construction Company is then unable to agree with said Canal Company as to what excess, if any, may be

so served, then and in that event, and so often as such may be the case, the Construction Company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judicially determined; and the question as to where the water must be measured to the contract holder under his contract with the Construction Company, and the question as to how much water must be so measured, as to any excess above said 170,000 acres, are not covered or affected by this stipulation and agreement or by any judgment which may be rendered hereunder.

5. The several contracts between the State of Idaho and the Construction Company and said Bondholders' Commtitee, and the various amendments to said contracts, are now and shall be binding and of full force and effect as between all parties concerned therein, except as the invalidity of any such contract may be pleaded in defense of any suit brought against any individual, but no statement contained in this stipulation and agreement shall be taken in any such suit as evidence of non-performance by the Construction Company of any of its obligations, covenants or agreement set forth in its several contracts with the State of Idaho or with any contract holders.

6. The parties of the first part will not collectively or individually, commence any other action, actions or proceedings, before any court or board, for the determination or consideration of any or

either of the issue, of law or fact, involved in this action; and this stipulation and agreement, as well as the judgment to be rendered hereunder, may be pleaded or shown in evidence, and shall constitute a complete defense or estoppel in any such action, actions or proceedings.

7. All of the terms and provisions of this stipulation and agreement may be taken by the Court as true and with the force of evidence, for the purpose of any judgment or decree which the Court may deem proper to enter herein and findings of fact and conclusions of law are hereby expressly waived.

8. The Continental and Commercial Trust and Savings Bank, as Trustee, becomes a party to this stipulation and agreement through its attorneys of record in this case for the purpose only of expressing its consent to the entry of judgment hereunder.

Dated December 18, 1917.

R. V. WILCOX,
ADAM B. BARCLAY,
E. M. WOLFE,
GUTHRIE & BOWEN & A. A. FRASER,
As Attorneys for Parties of the First Part.
P. S. HADDOCK,
E. A. WALTERS,
COBB WHEELRIGHT AND DILLIE,
As Attorneys for Construction Company.
HAWLEY & HAWLEY,
As Attorneys for Said Trustee.

EXHIBIT "B"
IN EQUITY.

In the District Court of the United States for the District of Idaho, Southern Division.

OLIVER HILL; W. P. RICE; E. C. GLEASON; CLARA T. VEAZIE; H. E. BARRETT; A. A. HOLBROOK; ROMAN M. TISS; LEWIS A. LEINBAUGH; J. F. HOBBS; JOHN T. THORPE.

Plaintiffs

vs.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Defendants

ROBERT ROGERSON, KENNETH McLEOD and BLAINE FURGERSON,

Intervenors

IN EQUITY, NO. 544.
DECREE.

This cause came on to be heard at this term. That permission was given to the above named Intervenors to file their bill in intervention and it was agreed that the material allegations of said bill in intervention were deemed denied by the plaintiff and defendants. Findings of fact and conclusions

of law were expressly waived by all parties in open Court. That a stipulation of facts and of settlement of this case and providing for judgment thereon was entered into by the parties hereto and said stipulation presented to the Court and duly considered, whereupon, it was ordered, adjudged and decreed as follows:

I.

That the Construction Company shall complete its irrigation system in accordance with the terms and conditions of its existing contracts with the State of Idaho, (including the contract dated January 22, 1916, between the Bondholders' Committee, so called, and said State) and when said system shall have been so completed and such completion shall have been duly certified by the Engineer of said State, as provided in said contracts, then and thereupon a full and complete compliance will have been affected as between the Construction Company and said State and the holders of contracts for the purchase of its water rights.

II.

That when its irrigation system shall have been so completed and shall have been finally accepted by the Board of Land Commissioners of said State, then and thereupon the Construction Company shall cause to be assigned to the North Side Canal Company, Limited, all of the right, title and interest in and to the Jackson Lake Reservoir, and to all stor-

age water, therein (estimated at 315,000 acre feet), as embodied and set forth in that certain agreement between the United States of America and the Kuhn Irrigation and Canal Company, a Delaware Corporation, dated February 25, 1913, a copy of which is now on file in the office of said Board of Land Commissioners, (and shall at once cause a proper assignment of said last mentioned agreement to be duly executed and placed in escrow in the Pacific National Bank of Boise, Idaho, to be delivered to said Canal Company, if and when the foregoing provisions of this paragraph shall have become effective.

III.

That the Construction Company may sell, and may keep sold as against any cancellation or foreclosures heretofore or hereafter effected, 170,000 shares in the capital stock of said Canal Company, (which shall represent the right upon the part of the holders or purchasers of such shares to irrigate 170,000 acres of land from the irrigation system of the Construction Company), and may collect the purchase price therefor, upon the understanding, however, that the sales of such stock aggregating something more than 712,000 shares thereof, heretofore made by the Construction Company shall be adjusted within the limit above provided through the cancellation of sufficient of such shares which have heretofore come under its control, through foreclosure or otherwise.

IV.

That, if at any time in the future the Construction Company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve, or can be made to serve, without *viliating* the settlers' contracts, more than 170,000 acres of land, and if the Construction Company is then unable to agree with said Canal Company as to what excess, if any, may be so served, then and in that event, and so often as such may be the case, the Construction Company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judicially determined; and the question as to where the water must be measured to the contract holder under his contract with the Construction Company, and the question as to how much water must be so measured, thereunder for the purpose of determining what acreage may be irrigated above said 170,000 acres, are not covered or affected by this decree.

V.

That the several contracts between the State of Idaho and the Construction Company and said Bondholders' Committee, and the various amendments to said contracts, are now and shall be binding and of full force and effect as between all parties concerned therein, except as the invalidity of any such contract may be pleaded in defense of any suit brought against any individual, but no state-

ment contained in said stipulation and agreement of this decree shall be taken in any such suit as evidence of non-performance of the Construction Company of any of its obligations, covenants or agreements set forth in its several contracts with the State of Idaho or with any contract holder.

VI.

Each party hereto shall pay his own costs.

Dated at Boise, Idaho, this 20th day of December, 1917.

FRANK S. DIETRICH,
District Judge.

EXHIBIT "E"
DEPARTMENT OF RECLAMATION
CAREY ACT ORDER

August 6, 1920.

In Re: Twin Falls North Side Land and Water Company's Project.

Final Acceptance of Works.

WHEREAS, The Twin Falls North Side Land and Water Company, on the 15th day of April, 1907, the 21st day of August, 1907, and the 2nd day of January, 1909, entered into three certain contracts with the State of Idaho, acting by and through the State Board of Land Commissioners, for the construction of a certain irrigation system with appurtenant structures under and by virtue of the law commonly known as the Carey Act, and the

provisions of the statutes of the State of Idaho, relating thereto which said contracts have from time to time altered and amended in various respects by resolutions and orders of said Board and by subsequent agreements of said parties, and by an agreement with the depositing Bondholders all as shown by the records and files of the Department of Reclamation and State Board of Land Commissioners; the plans, specifications and design of which have from time to time been modified and altered, and such alterations and modifications have been approved by the State Engineer of Idaho and the Commissioner of Reclamation of the State of Idaho, all as shown by the records and files; and,

WHEREAS, Under said contracts and the law relating thereto, it is the duty of the Department of Reclamation to receive and to accept said irrigation system with appurtenant structures, for and on behalf of the State of Idaho, and the North Side Canal Company, Limited, and the Stockholders thereof, and the North Side Pumping Company and the Stockholders thereof, when the same shall have been constructed and completed in accordance with the provisions and terms of said contracts and the alterations and amendments and modifications thereof and agreements pertaining thereto as hereinbefore detailed; and,

WHEREAS, The said Twin Falls North Side Land and Water Company has tendered to the State of Idaho, and the Department of Reclamation, said

irrigation system and appurtenant structures as completed according to contracts, amendments thereto and supplemental agreements and orders pertaining thereto, for acceptance on behalf of the State of Idaho, and on behalf of the North Side Canal Company, Limited, and stockholders thereof, and the North Side Pumping Company and stockholders thereof; and,

WHEREAS, Upon receipt of such tender an exhaustive and extended investigation and examination of the said Irrigation System and appurtenant structures has been conducted by the Department of Reclamation, acting in cooperation with the settlers upon the project, the officers of the North Side Canal Company and their engineer, Mr. R. K. Tiffany, together with the engineers and officers of the Twin Falls North Side Land and Water Company, which examination has disclosed the fact that the said irrigation system and appurtenant structures have been constructed and completed in accordance with the said plans and specifications as the same have been amended, changed or modified as hereinabove set forth; except in certain particulars hereinafter specifically mentioned. The estimated cost of completing these specified items is $8,760.00 detailed as follows:

"J" Lateral Headworks, lowering radial gates........................$ 300.00

Improving "K" Coulee	2,000.00
Cost of completing certain Laterals:	
X-26	25.00
X- 9	50.00
X- 6	35.00
X-49	50.00
W-7)	
W-8)	300.00
Improving X-9 runoff	3,000.00
To care for excess maintenance caused by Y-9 runoff	3,000.00
Total	$8,760.00

and,

WHEREAS, the Board of Directors of the North Side Canal Company, Limited, has, by resolution adopted July 31, 1920, a certified copy of which is on file in the Department of Reclamation of the State of Idaho, authorized this Department to approve the acceptance of said sum of $8,760.00 by the said North Side Canal Company, Limited, from the Twin Falls North Side Land and Water Company, in lieu of the performance of the said work hereinbefore detailed, and more particularly described, specified and set forth in the report of R. K. Tiffany directed to the Directors of the North Side Canal Company, Limited, bearing date of July 23, 1920, a copy of which is on file in this Department, and has by resolution requested this Department to accept said irrigation system and appurtenant structures as completed according to the con-

tract and amendments of said contract as hereinbefore detailed, and as a full, complete and entire compliance therewith for and on behalf of the State of Idaho, and for and on behalf of the North Side Canal Company, Limited, and the stockholders thereof, and the North Side Pumping Company and the stockholders thereof; and

WHEREAS, The treasurer of the North Side Canal Company, Limited, has certified to this office that the Twin Falls North Side Land and Water Company has paid to said North Side Canal Company, Limited, the sum of $8,760.00, pursuant to the resolution of the Board of Directors of said Canal Company;

NOW, THEREFORE, in consideration of the premises, and the foregoing recitals, I, W. G. Swendsen, the Commissioner of Reclamation of the Department of Reclamation of the State of Idaho, by virtue of the authority in me vested by the statutes of the State of Idaho, and acting for and on behalf of the State of Idaho, and for and on behalf of the North Side Canal Company, Limited, and the stockholders thereof, and the North Side Pumping Company and the stockholders thereof, do hereby order and direct as follows:

1. That that certain irrigation system with appurtenant structures as now constructed by the Twin Falls North Side Land and Water Company be, and the same is hereby accepted for and on be-

half of the State of Idaho, and for and on behalf of the North Side Canal Company, Limited, and stockholders thereof, and the North Side Pumping Company and stockholders thereof, as a full and complete performance of all contract and other requirements imposed upon said Twin Falls North Side Land and Water Company, pertaining to the construction of said irrigation system and appurtenant structures, which said irrigation system and appurtenant structures were constructed under and by virtue of certain contracts made by and between the State of Idaho, acting by and through the State Board of Land Commissioners, as the party of the first part, and the Twin Falls North Side Land and Water Company, as the party of the second part, and entered into on the 15th day of April, 1907, the 21st day of August, 1907, and by the 2nd day of January, 1909; and which said contracts have from time to time been altered and amended in various respects by resolutions and orders of the State Board of Land Commissioners and Department of Reclamation and supplemental agreements between said mentioned parties and an agreement with depositing Bondholders, and which plans and specifications detailed in said contracts have from time to time been altered and amended and approved by the State Engineer of the State of Idaho and the Commissioner of Reclamation of the State of Idaho.

2. That the complete ownership, title and control of said irrigation system and appurtenant

structures as now built and constructed, may now pass to and become vested, respectively, in the North Side Canal Company, Limited, and the North Side Pumping Company, being corporation organized for the purpose of acquiring, maintaining and operating said irrigation system in the interest of the respective owners of water rights therein, and the said Twin Falls North Side Land and Water Company is hereby relieved from any further duty or liability in relation to said irrigation system or appurtenant structures.

3. That the payment of the sum of $8,760.00 made by the Twin Falls North Side Land and Water Company to the North Side Canal Company, Limited, shall relieve the Twin Falls North Side Land and Water Company from the performance of the things detailed hereinbefore, and detailed in the said report of the said R. K. Tiffany; that all things pertaining to the construction of said irrigation system and appurtenant structures required of said Twin Falls North Side Land and Water Company by the State Board of Land Commissioners of the State of Idaho, or by the State Engineer, or the Commissioner of Reclamation of Idaho, have been fully and completely performed by said Twin Falls North Side Land and Water Company, except those things hereinbefore enumerated, and in full settlement and adjustment of which I hereby approve payment of $8,760.00 to the North Side Canal Com-

pany, Ltd., by the said Twin Falls North Side Land and Water Company.

4. That those certain Liberty Bonds of the United States Government, numbered 430638 to 430647, in the sum of Five Thousand ($5,000.00) Dollars heretofore deposited with the State Board of Land Commissioners, by the Twin Falls North Side Land and Water Company under resolution adopted November 1, 1918, be now returned and delivered to the North Side Canal Company, Limited, from the proceeds of which the said North Side Canal Company, Limited, can make such improvements and changes at the "controlling works" in such manner and at such times as its Board of Directors shall deem proper, and that said North Side Canal Company, Limited, shall be under no obligation to return any part or portion of said fund to the Twin Falls North Side Land and Water Company, if the same be not by it expended in the alteration or improvement of said "controlling works," and said Twin Falls North Side Land and Water Company is hereby relieved from any further duty or obligation in relation to said "controlling works," and the future repair, alteration, or construction thereof.

5. That that certain agreement, made the 22nd day of January, 1916, by and between William A. Durst, of Minneapolis, Minnesota; Haydn S. Cole, of St. Paul, Minnesota, and George L. Edwards, of St. Louis, Missouri, the parties of the first part, and

acting as a committee of depositing bondholders, and the State of Idaho, as the party of the second part, has been completely performed and fulfilled and satisfied and the official of the State of Idaho having the present custody of the first mortgage six percent gold bonds of the Twin Falls North Side Land and Water Company, detailed in said agreement of the par value of Three Hundred Thousand ($300,000) Dollars, together with interest coupons thereto attached, shall forthwith deliver the same to the said parties of the first part or to their written order.

6. That any and all bonds that may have been given to the State of Idaho by the said Twin Falls North Side Land and Water Company under the provisions of the various State contracts or amendments thereto, conditioned upon the final completion of the irrigation system and works by the said Twin Falls North Side Land and Water Company, be and the same are, hereby released, provided, however, that prior to any additional irrigation works or appurtenant structures being constructed by the Twin Falls North Side Land and Water Company or its assigns, it or they shall enter into contracts with the State of Idaho for so doing and give such bond as may be required.

7. This order is made only for the purpose of accepting as completed the physical properties as now built and constructed by the Twin Falls North Side Land and Water Company, and all has herein

recited and such acceptance is based upon a present carrying capacity of the irrigation works as now constructed and operated, sufficient to serve or irrigate at least 170,000 acres of land but nothing in this order shall be construed so as to fix, curtail, or place a limitation upon the stock of the North Side Canal Company, Limited, which may hereafter be sold by the Twin Falls North Side Land and Water Company, or the water rights in said irrigation system which may yet remain to be hereafter sold by the Twin Falls North Side Land and Water Company, provided, however, that in the event water stock or water rights in said irrigation system are hereafter sold by order of Court or otherwise, in excess of the said 170,000 acres or shares, the said Twin Falls North Side Land and Water Company or its successors in interest shall be required to, at their own expense, perform such work as may be necessary in increasing the capacity of the irrigation system, should such increase of capacity at that time be found necessary, by enlargement or otherwise, sufficient to provide a safe carrying capacity for such additional water rights or water stock as may be sold in addition to the 170,000 shares.

(Signed) W. G. SWENDSEN,

(SEAL) Commissioner of Reclamation.

Attest: FLEDA REYNOLDS,
Carey Act Clerk.

EXHIBIT "F"

THIS AGREEMENT, Made and entered into this 27th day of July, 1921, by and between the TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, party of the first part (hereinafter for brevity called The Land and Water Company), and the NORTH SIDE CANAL COMPANY, LIMITED, party of the second part (hereinafter for brevity called the Canal Company), and the State of Idaho acting by and through the Department of Reclamation, party of the third part (hereinafter for brevity called the State), WITNESSETH:

THAT WHEREAS, The State did prior hereto, for the purpose of reclamation and settlement, procure to be made by the United States, under the provisions of what is commonly called the "Carey Act" the segregation of certain public lands, as set forth and described in those certain land lists known as Idaho Carey Act Segregation Lists Nos. 4, 6, 11, 13 and 24, copies of which are now on file in the Department of Reclamation for said State, comprising what is known as the Twin Falls North Side Land and Water Company Irrigation Project; and

Whereas, The Land and Water Company did on the 15th day of April, 1907, the 21st day of August, 1907, and the 2nd day of January, 1909, enter into certain contracts with the State to construct an irrigation system for the reclamation of said lands, and certain agreements supplemental thereto, all as described and detailed in said contracts and supple-

mental agreements (and which have been amended from time to time) which said contracts and said supplemental agreements and amendments thereto are now on file and of record in the Department of Reclamation for said State; and

Whereas, The work to be done and performed and rights to be acquired under said several contracts, supplemental agreements and amendments thereto have been completed and acquired, and said work has been accepted by said State, as more fully appears from its order made on the 6th day of August, 1920, copy of which said order is attached hereto and marked "Exhibit A" and made a part hereof; the total amount of stock in the Canal Company to be sold and kept sold by said Land and Water not being fixed or determined by said Order, it being now intended, however, by the State, by this agreement to so fix and determine such total amount of stock to be sold and kept sold by said Land and Water Company, and thereby and hereby fix and determine the same; and

WHEREAS, The Canal Company is the company mentioned and described in said State Contracts, and is now vested with the franchises, privileges and titles therein enumerated, and is now fully and completely exercising the powers and privileges accorded to it by law; and

WHEREAS, the North Side Pumping Company is a stockholder of the Canal Company, and is a corporation organized to operate that portion of said

North Side Irrigation Project which is served by means of pumps; and

WHEREAS, In a certain action in the United States District Court for the State of Idaho, in and for the Southern Division, in which Oliver Hill, et al, were plaintiffs, and the Land and Water Company, et al, were defendants, a certain stipulation was entered into on or about the 18th day of December, 1917, and a decree by stipulation was duly entered therein on or about the 20th day of December, 1917, relating among other things to the number of shares of stock in said Canal Company which the Land and Water Company might then sell and keep sold, which at that time was agreed among the parties to the said action, and confirmed by said Court at 170,000 shares, a copy of which said Decree is attached hereto, marked Exhibit "B" and made a part hereof, which said Decree (Exhibit "B") provides among other things as follows:

> "4. That if, at any time in the future, the Construction Company, its successors, or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve or can be made to serve without violating the settlers' contracts, more than 170,000 acres of land and if the Construction Company is then unable to agree with said Canal Company, as to what excess, if any, may be served, then, and in that event, and so often as such may be the case, the Construction Company, its successors,

> or assigns, may bring an action in any Court of competent jurisdiction, to have said question judicially determined; and the question as to where the water must be measured to the contract holder, under the contract with the Construction Company, and the question as to how much water must be measured thereunder for the purpose of determining what acreage may be irrigated above said 170,000 acres are not covered or affected by this decree."

AND WHEREAS, Since the date of said Decree, the capacity of said canal system and its efficiency have been greatly increased, a considerable portion of which work was not required by said State Contracts, but was performed by the Land and Water Company without contract requirement for the purpose of making it possible to increase the area that could be reclaimed, and to the end that the Land and Water Company might sell and keep sold more than 170,000 shares of the capital stock of the Canal Company as provided in said paragraph four of said Decree (Exhibit "B"); and

WHEREAS, Said work of canal enlargement and improvement has been completed, including an increased right in the Milner Diversion Dam, by means of which about 500 second feet of additional water can now be diverted into said canal system; and

WHEREAS, Said work of canal enlargement and improvement has been completed, including an increased right in the Milner Diversion Dam, by means of which about 500 second feet of additional water can now be diverted into said canal system; and

WHEREAS, It has been determined and ascertained by the parties hereto, and so agreed, that said irrigation system and the present water supply therefor can, without violating the terms or provisions of the settlers' contracts, irrigate and reclaim 185,000 acres of land; and

WHEREAS, Acting under the provisions of paragraph four of said Federal Decree (Exhibit "B" hereto), which said paragraph is hereinbefore quoted, it is the desire of the Canal Company, the Land and Water Company, and the State, to agree as to the number of shares of stock of the Canal Company which the Land and Water Company may sell and keep sold in excess of 170,000 shares;

NOW THEREFORE, For the purpose and with the desire of so fully and completely agreeing, and for the purpose of avoiding the necessity of said parties resorting to the courts for a determination of said question, for and in consideration of the rights, privileges, and properties hereby conveyed, and the covenants, terms and agreements herein mentioned, and to be observed and performed by the respective parties hereto,

IT IS HEREBY AGREED AS FOLLOWS:

1. That the Land and Water Company may sell and keep sold 185,000 shares of the capital stock of the Canal Company, representing the right on the part of the Land and Water Company to sell water rights for the irrigation of 185,000 acres of land, hereby granting and confirming unto the Land and Water Company the right to sell and dispose of 15,000 shares of the capital stock of the Canal Company in addition to the number of shares that is at the present time sold and outstanding, or authorized as aforesaid to be sold and kept outstanding; that the sale and disposal of such 15,000 shares of stock shall be extended over such period of time, not less than five years from and after the date of this contract, in such manner as not to unduly interfere with the operation of the canal system, providing that three thousand shares may be sold each year hereafter from and after the date hereof, and such shares in excess thereof as in the opinion of the Board of Directors of the Canal Company may be sold without undue interference with the distribution of water through said system, and that such lands when entered, to which such additional shares shall be made appurtenant, shall be subject to the same assessment for maintenance and operation as to other lands under said canal system, and the same charges for rights in the American Falls Reservoir, if any rights be hereinafter acquired by the

Canal Company, as other lands in the same segregation are charged for such rights if so acquired.

2. That the Land and Water Company shall, on or before the first day of November in each year hereafter, select from the lands subject to entry, which can be served with water for irrigation from the irrigation system of the Canal Company, such number of acres, the irrigable agricultural portion of which shall not exceed three thousand acres, for which the said Land and Water Company may thereafter sell shares of stock of said Canal Company, as herein provided, or may in lieu of any portion thereof sell water rights for use on lands taken up under the Desert Land or Homestead Acts, or for lands belonging to the State of Idaho, or otherwise privately owned, the total thereof, however, not to exceed said three thousand acres in any year, as herein provided, unless an increased amount is authorized as aforesaid by the Directors of the Canal Company. It is understood that the first selection shall be made on or before the first day of November, 1921, or as soon thereafter as possible, in the event that the Canal Company shall hereafter acquire an interest in the proposed American Falls Reservoir, or shall have water otherwise available for the reclamation of the remaining lands in said project in excess of said 185,000 acres, the Land and Water Company shall, upon the request of the Canal Company at said time such water is available, select the remainder of said 15,000 acres, if any por-

tion thereof shall not then have been selected, as herein provided. That in the event the enlargement or construction of any lateral is necessary, or a new or enlargement of any existing pumping plant is necessary, for the delivery of the water to the lands or any portion thereof so selected, for which water rights represented by shares of stock of the Canal Company shall have been sold, the same shall be done by the Land and Water Company at its sole expense at such time and in such manner as not to interfere with the operation of the Canal Company, the plans therefor to be mutually agreed upon by the Land and Water Company and the Board of Directors of the Canal Company or the Board of Directors of the Pumping Company, as the case may be, and approved by the Commissioner of Reclamation of the State of Idaho; in case of failure to so agree within 30 days, then such plans as may be necessary for said work shall forthwith be fixed and determined by the Commissioner of Reclamation of the State of Idaho, and such work shall be performed in accordance with said plans, and when so performed shall be approved and accepted by said Commissioner.

3. That the Twin Falls North Side Investment Company, Limited, shall not so develop and improve its lands as to increase the demand for water thereon faster than an average of three thousand acres a year, unless such figure be increased by mutual agreement between the Board of Directors of said

Canal Company and the Land and Water Company. In this paragraph the Land and Water Company speaks for and guarantees the performance and observance hereof by said Twin Falls North Side Investment Company, Limited.

4. That the parties hereto (the Canal Company acting for and on behalf of its stockholders, including the plaintiffs and intervenors in said Federal suit) deem and consider the agreement entered into herein a full and complete compliance with the provisions of said Decree, hereinbefore mentioned, and particularly paragraph 4 thereof, and the Stipulation upon which the same is based, and that this contract and agreement shall be considered, if the same be deemed necessary. A stipulation by and between the parties in said suit for the amendment of said Decree as herein recited, in so far as applicable.

5. That this contract and the number of shares of stock in said Canal Company hereby agreed and authorized to be sold and kept sold by said Land and Water Company is and shall be deemed in compliance with and not in violation of that provision of the contracts between the Land and Water Company and the State, which provide that in no case shall water rights or shares be dedicated to any lands or sold beyond the carrying capacity of the canal, or in excess of the appropriation of water therefor.

6. That no water shall be sold for or required to be furnished to school lands situated within the

segregations after the sales of shares of stock or water rights in the Canal Company have been made by the Land and Water Company to the extent of 185,000 shares as herein provided.

7. That the said Land and Water Company does hereby assign, transfer, set over and relinquish all its remaining rights, equities and franchises in and to said segregations, its privileges therein and thereto, its irrigation system, and rights, franchises and equities of whatever nature or kind connected therewith, to the North Side Canal Company, Limited, or the North Side Pumping Company, as the case may be, not heretofore conveyed or assigned, subject, however, to the right of the Land and Water Company to sell and keep sold the maximum of 185,000 shares of stock in said Canal Company representing the right to irrigate 185,000 acres of land within said segregations from the present water supply through said irrigation system as now or hereafter constructed, and reserving its right, title, estate, lien or interest in and to all the lands or any portion thereof to which said 185,000 shares of stock are or may be made appurtenant, also reserving all its assets represented by land, mortgages, water contracts, contracts of sale, accounts and bills receivable, stocks and bonds, and also its tangible personal property, intending hereby to give and grant to said North Side Canal Company, Limited, or said North Side Pumping Company, as the case may be, full power and right to exercise those remaining

rights, privileges, and franchises which might otherwise be exercised by said Land and Water Company. It being understood that the rights given and granted to the said Pumping Company hereby relate only to such portion of said project as can only be served by pumping water therefor and for which said Pumping Company shall have or acquire stock in said Canal Company.

8. The State hereby consents and assents to the transfer or assignment hereby made by the Land and Water Company to the Canal Company, and to the North Side Pumping Company.

9. That the respective parties hereto, hereby covenant, stipulate and agree that the terms, conditions, provisions and covenants of all contracts between the Land and Water Company and the State of Idaho, or the Bondholders' Committee and the State of Idaho, and all other contracts or agreements by and between either of the parties hereto have been fully complied with, and performed, and as to all matters not otherwise reserved herein, the rights of said Land and Water Company in such contracts and agreements are hereby terminated.

The terms and conditions of this contract shall extend to and be binding upon the successors and assigns of the parties hereto.

The execution of this agreement has been duly authorized by resolutions of the Board of Directors of the first and second parties hereto, and said parties hereto, in pursuance thereof, have caused

their corporate names and seals to be hereunto affixed by their proper officers.

IN WITNESS WHEREOF, The parties have hereunto set their hands and seals, the day and year first above written.

Executed in triplicate.

TWIN FALLS NORTH SIDE LAND AND WATER COMPANY,
By W. A. DURST, President.
Party of the First Part.

Attest:
E. A. W.
R. E. S.
IRA C. OEHLER, Secretary.

NORTH SIDE CANAL COMPANY, LIMITED,
By C. C. WILBURN, President.
(SEAL) Party of the Second Part.
Attest:
AB. B.
For Canal Company.
HARVEY W. HURLEBAUS,
Secretary.

STATE OF IDAHO,
By W. G. SWENDSEN,
Commissioner of the Department of Reclamation,
(SEAL) Party of the Third Part.
Attest:
ALTA C. PURPUS,
Carey Act Clerk.

STATE OF MINNESOTA,)
) ss.
County of Hennepin,)

On this 3rd day of August in the year 1921, before me, W. H. M. Adams, a Notary Public in and for said County and State, personally appeared W. A. Durst, known to me to be the President of the Twin Falls North Side Land and Water Company, and Ira C. Oehler, known to me to be Secretary of said Company, the corporation that executed the within instrument, as the party of the first part, and acknowledged to me that such corporation executed the same.

Attest, my hand and official seal, the day and year in this Certificate first above written.

W. H. M. Adams,
(SEAL) Notary Public.

My commission expires April 17, 1923.

STATE OF IDAHO,)
) ss.
County of Jerome)

On this 28th day of July, in the year 1921, before me, CHARLES E. LOVETT, a Notary Public in and for said County and State, personally appeared C. C. Wilburn, known to me to be the President of the North Side Canal Company, Limited, and Harvey W. Hurlebaus, Secretary thereof, the corporation that executed the within instrument as the party of the second part, and acknowledged to me that such corporation executed the same.

Attest, my hand and official seal, the day and year in this certificate first above written.

(SEAL) CHARLES E. LOVETT,
Notary Public, Residing in Jerome, Idaho.
My commission expires February 14, 1922.

STATE OF IDAHO,)
) ss.
County of Ada,)

On this 12th day of August, in the year 1921, before me, Jennie M. Haley, a Notary Public in and for said County and State, personally appeared W. H. Swendsen, known to me to be the Commissioner of the Department of Reclamation of the State of Idaho, acting for and on behalf of said State of Idaho, the party of the third part, and acknowledged to me that the State of Idaho executed the same.

Attest, my hand and official seal, the day and year in this certificate first above written.

JENNIE M. HALEY,
(SEAL) Notary Public.

My commission expires 12-24-'21.

The North Side Pumping Company accepts and approves the terms and conditions of the above and foregoing agreements, and by resolution of its Board of Directors has authorized the Vice-President and Secretary of said Board acting for said North Side Pumping Company, to endorse and indicate said approval on said agreement.

NORTH SIDE PUMPING COMPANY,
By CHAS. O. GREENWOOD,
(SEAL) Vice President.

Attest:
HARVEY W. HURLEBAUS,
Secretary.

The Twin Falls North Side Investment Company, Limited, accepts and approves the terms and conditions of the above and foregoing agreement, and by resolution of its Board of Directors has authorized the President and Secretary of said Board acting for said Twin Falls North Side Investment Company, to endorse and indicate said approval on said agreement.

TWIN FALLS NORTH SIDE INVESTMENT COMPANY, LIMITED,
By W. A. DURST,,
R. E. S. (SEAL) President.

Attest:
IRA C. OEHLER, Secretary.

Endorsed, Filed Aug. 29, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

OBJECTION TO APPLICATION FOR PERMISSION TO FILE SUPPLEMENTAL BILL OF COMPLAINT.

COME NOW the defendants in the above entitled action and oppose the motion of "supplemental complainant, D. L. McClung," for an order permitting the filing of a supplemental bill of complaint herein, and move the Court for an order denying the said McClung permission to file said supplemental bill of complaint, all upon the following grounds and for the following reasons:

I.

The said defendants reiterate, adopt and by reference make a part hereof, each and all of the objections enumerated and set forth in that certain "Objection to Application for Permission to file Supplemental Bill in Intervention" filed by these defendants in this action on the 20th day of December, 1927, and to hereby urge each and all and every of said objections to this application of said McClung as fully as though set forth herein at length.

II.

Upon the further ground that the matter sought to be presented by said Motion for Permission to File Supplemental Bill, has already been decided by this Court in this action adversely to the said McClung in that the said supplemental bill is merely a

repetition of that certain "Supplemental Bill in Intervention" heretofore attempted to be filed by said McClung and which was denied by this Court.

III.

For the further reason that the matters and things attempted to be set up in paragraph XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII and XXIII, seek to present matters which are not in any way or at all germane to or connected with, the original bill of complaint herein, but are an attempt to inject into and litigate, an entirely new, separate and different cause or causes of action from that presented by the original bill of complaint and/or bill in intervention herein.

IV.

That the matters and things attempted to be set up in paragraphs XV to XXIII, inclusive, of the Supplemental bill of Complaint, now tendered, present only matters which, if they state any cause of action at all, have long since been barred by the Statute of Limitations of the State of Idaho and particularly by Sections 6609, 6610, 6611, 6612, 6613, 6617 and/or 6617, Idaho Compiled Statutes, 1919.

That this objection and motion is made upon all of the records and files of this action and particularly upon the aflidavit of E. A. Walters with the exhibits thereto attached, which was attached to, and by reference made a part of, that certain "Ob-

jection to Application for Permission to File Supplemental Bill in Intervention" which was filed in this Court on the 20th day of December, 1927, and which latter is particularly by reference, made a part hereof.

Dated this 20th day of September, 1928.

WALTERS & PARRY,
Attorneys for Defendants

(Service Acknowledged)

Endorsed: Filed Sept. 21, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

MEMORANDUM DECISION.
Oct. 3, 1928.

J. B.ELDRIDGE,
Attorney for Supplemental Complainant
WALTERS & PARRY,
Attorneys for Defendants

CAVANAH, DISTRICT JUDGE:

This is the second application of D. L. McClung for an order permitting him to file a supplemental

bill of complainant in the original action in which the decree in question was rendered. The first applicaton was denied for the reasons set forth in the memorandum opinion of this Court of date February 6, 1928, which is here referred to. The reasons now advanced in the second application are practically the same as were advanced and passed upon in the first application, and attention is called to the Court's views then expressed in its memorandum opinion as reasons why the second application should be denied. It follows then that the second motion for permission to file the proposed bill is denied.

Endorsed: Filed Oct. 3, 1928.
W. D. McReynolds, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

ORDER DENYING SECOND APPLICATION TO FILE SUPPLEMENTAL BILL OF COMPLAINT.

Upon consideration, and in harmony with Memorandum Decision this day filed.

BE IT ORDERED, That the second motion for permission to file proposed supplemental bill of com-

plaint be and the same is hereby denied, exceptions allowed.

Dated: Boise, Idaho, October 3, 1928.

(Sgd.) CHARLES C. CAVANAH,
District Judge

Endorsed: Filed Oct. 3, 1928.
W. D. McReynolds, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

ORDER FOR CERTIFYING ORIGINAL EXHIBITS.

Application having been made to this Court for an Order for the Clerk of this Court to certify up the exhibits attached to the "Objection to Application for Permission to File Supplemental Bill in Intervention" by D. L. McClung in the above entitled cause, for the reason that said exhibits consist in large part of printed pamphlets and printed contracts and copies of Complaints in other proceedings and copies of contracts, and

IT APPEARING TO THE COURT that said exhibits could be more readily examined by the members of the Appellate Court in their printed form and in the form in which they were attached to said Objections than if the same were printed in a transcript and would be much more economical for parties litigant to have the same sent up as exhibits

and far more convenient for the members of the Court, as aforesaid.

WHEREFORE, IT IS ORDERED, That the exhibits attached to the "Objection to Application for Permission to File Supplemental Bill in Intervention" by D. L. McClung, be certified up as exhibits by the Clerk of this Court, and that the same be not incorporated in the transcript on appeal in said cause.

Dated this the 21st day of December, 1928.

CHARLES C. CAVANAH,
District Judge

Endorsed: Filed Dec. 21, 1928.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

PETITION FOR APPEAL.

Comes now D. W. McClung, supplemental complainant in the above entitled cause, and says:

That on the 3rd day of October, 1928, this Court entered judgment herein in favor of defendants and against this supplemental complainant in denying the petition of this petitioner to file a supplemental bll in said above entitled cause, and in the denial of the petition of this petitioner to file his said supplemental bill certain errors were committed to the manifest prejudice of this supplemental complainant, all of which appears more fully and in

detail from the Assignments of Error filed with this petition.

WHEREFORE, THIS SUPPLEMENTAL COMPLAINANT PRAYS, That an appeal may be allowed by him from the United States District Court for the District of Idaho, Southern Division, to the United States Circuit Court of Appeals for the 9th Circuit for the correction of the errors so complained of, and that a transcript of the record proceedings or papers upon which said judgment or order was passed duly authenticated may be sent to the said United States Circuit Court of Appeals for the 9th Circuit, and that this supplemental complainant tenders herewith a bond in the sum of three hundred ($300.00) dollars to cover costs, and prays that said appeal be allowed.

Dated at Boise, Idaho, this the 18 day of December, 1928.

J. B. ELDRIDGE,
Attorney for Supplemental Complainant
Residence, Boise, Idaho

Endorsed: Filed Dec. 18, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

ASSIGNMENTS OF ERROR.

Comes now D. L. McClung, the supplemental complainant in the above entitled cause, by his attorney, and in connection with his petition for appeal herein says that there is manifest error in the record proceedings and judgment and order herein, and it particularly assigns the following error:

That the Court erred in entering judgment or order denying the right of the supplemental complainant and petitioner in the above entitled cause to file his supplemental bill therein.

WHEREFORE, THE SUPPLEMENTAL COMPLAINANT PRAYS, That judgment of the District Court be reversed, and that the Court be directed to enter an order permitting the supplemental complainant to file his supplemental bill in said cause. That supplemental complainant have such other and further relief as may appear equitable and just.

J. B. ELDRIDGE,
Attorney for Supplemental Complainant

Endorsed: Filed Dec. 18, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

ORDER ALLOWING APPEAL.

Now, to-wit, on the 18th day of December, 1928, it is hereby ordered that the above and foregoing Petition for Appeal is hereby granted and allowed as prayed for upon the filing of a bond for costs in the sum of three hundred ($300.00) dollars with sufficient sureties to be conditioned as required by law.

CHARLES C. CAVANAH,
District Judge

Endorsed: Filed Dec. 18, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS:

That I, D. L. McClung, the supplemental complainant, as Principal, and THE CONTINENTAL CASUALTY COMPANY, as Surety, acknowledge ourselves to be jointly indebted to the Plaintiffs, OLIVER HILL, W. P. RICE, E. C. GLEASON, CLARA T. VEAZIE, H. E. BARRETT, A. A. HOLBROOK, ROMAN M. TISS, LEWIS A. LEINBAUGH, J. F. HOBBS and JOHN T. THORPE, to the Defendants, TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware

Corporation, and the CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee, and to the Intervenors, ROBERT ROGERSON, KENNETH McLEOD, and BLAINE FURGERSON, appellees in the above cause, and to each of said appellees, in the sum of Three Hundred and No/100 ($300.00) Dollars, conditioned that:

WHEREAS, on the 3rd day of October, 1928, in the District Court of the United States, for the District of Idaho, Southern Division, in a suit pending in that Court, wherein, to the Plaintiffs, OLIVER HILL, W. P. RICE, E. C. GLEASON, CLARA T. VEAZIE, H. E. BARRETT, A. A. HOLBROOK, ROMAN M. TISS, LEWIS A. LEINBAUGH, J. F. HOBBS, and JOHN T. THORPE, to the Defendants, TWIN FALLS NORTH SIDE LAND AND WATER COMPANY, a Delaware Corporaton, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee, and to the Intervenors, ROBERT ROGERSON, KENNETH McLEOD and BLAINE FURGERSON, which suit was numbered on the equity docket as No. 544, an order was entered denying the relief prayed for by the said D. L. McClung, the supplemental complainant, and the said D. L. McClung, having obtained an order allowing appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the said order, and a citation directed to the said appellees above mentioned, citing and ad-

monishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California, in said circuit, within thirty days from the date of said citation.

NOW, if the said D. L. McClung shall prosecute its said appeal to effect, and answer all costs and damages if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF, D. L. McClung has caused these presents to be executed by its proper corporate officers as Principal, and said CONTINENTAL CASUALTY COMPANY has caused its name to be subscribed and its corporate seal to be affixed thereto this 20th day of December, 1928.

(SEAL) D. L. McCLUNG,
Per J. B. E.

CONTINENTAL CASUALTY COMPANY,
By CHAS. W. MACK,
Its Attorney-in-Fact.

Countersigned by
CHAS. W. MACK, Res. Agt.

The form of the foregoing bond and sufficiency of surety are approved this 20th day of December, 1928.

CHARLES C. CAVANAH,
District Judge

Endorsed: Filed Dec. 20, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

CITATION.

To the above named defendants and to the above named intervenors and to Walters and Parry and to E. A. Walters and R. P. Parry, Esquires, the attorneys of record of the above named defendants, and to E. M. Wolfe, Esquire, attorney of record for the above named intervenors.

The above named defendants and intervenors are hereby admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, within thirty (30) days from the date of this appeal pursuant to an appeal on file in the Clerk's office of the District Court of the United States for the District of Idaho, Southern Division, wherein D. L. McClung is plaintiff in error and you, the said defendants and intervenors, are defendants in error, to show cause, if any there be, why the judgment or order mentioned in said appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, The Honorable C. C. Cavanah, United States District Judge for the District of Idaho, this

18th day of December, 1928, and of the independence of the United States the one hundred fifty-second year.

CHARLES C. CAVANAH,
(SEAL) *District Judge.*

Attest:
W. D. McREYNOLDS, Clerk.

Endorsed: Filed Dec. 20, 1928.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

PRAECIPE FOR TRANSCRIPT.

TO W. D. McREYNOLDS, CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare the record upon the appeal of supplemental complainant and plaintiff in error, D. L. McClung, taken in the above entitled cause from the judgment or order made and entered in said cause on the third day of October, 1928, such record to consist of the pleadings, documents and papers in said cause in the following order:

1. Original Motion or Petition of First Application filed December 7, 1927.

2. Objections to Motion or Petition filed December 20, 1927.

3. Memorandum Decision of Court filed February 6, 1928.

4. Second Motion or Application filed August 29, 1928.

5. Objections to second Application filed September 21, 1928 .

6. Last Memorandum Decision of Court filed October 3, 1928.

7. Order of Court denying the right of supplemental complainant to file his supplemental bill of complaint with exceptions allowed, filed October 3, 1928.

8. All papers filed in connection with Petition for Appeal, Assignments of Error, Order Allowing Appeal, Bond on Appeal with Order approving the same, Citation together with this Præcipe, and Affidavit of J. B. Eldridge showing service of Assignments of Error, Citation and Præcipe together with your return to the Appeal and your certificate, and all papers filed in said cause after the filing of this Præcipe: Affidavits showing service of Motions.

In preparing the above record you will please omit the title to all pleadings except the supplemental bill of complainant, inserting in lieu thereof the words "title of court and cause" followed by the name of the pleading or instrument. You will also please omit the verification of all pleadings, insert-

ing in lieu thereof whenever the pleading is verified, the words "duly verified."

Dated this the 19th day of December, 1928.

J. B. ELDRIDGE,

Attorney for Supplemental Complainant and Plaintiff in Error.

Endorsed: Filed December 20, 1928.

W. D. McREYNOLDS, Clerk.

By M. Franklin, Deputy.

(Title of Court and Cause)

AFFIDAVIT

PROOF OF SERVICE

STATE OF IDAHO,)
) ss.
County of Ada,)

J. B. ELDRIDGE, being first duly sworn, deposes and says:

That he is attorney for D. L. McClung, supplemental complainant and appellant in said cause, and that on December 20, 1928, a true copy of the Citation, Assignments of Error and Præcipe were enclosed in an envelope addressed to E. M. Wolfe, Esquire, at Twin Falls, Idaho, the then address of the said E. M. Wolfe, attorney of record for the Intervenors in the above entitled cause, and that the required amount of postage was prepared and attached to said envelope and said envelope registered

to the said E. M. Wolfe and return card requested, that the registry charge on said letter was prepaid, and that the same was deposited in the United States Postoffice at Boise, Idaho, on December 20, 1928, by affiant herein, and that said Intervenors and said attorneys were so served on the 25th day of December, 1928, with said papers, as aforesaid; that on December 20, 1928, a true copy of the Citation, Assignment of Error and Præcipe were enclosed in an envelope addressed to Walters & Parry, E. A. Walters and R. P. Parry, Esquires, at Twin Falls, Idaho, the then address of the said Walters & Parry, E. A. Walters and R. P. Parry, attorneys of record for the defendants in the above entitled cause, and that the required amount of postage was prepaid and attached to said envelope and said envelope registered to the said Walters & Parry, E. A. Walters and R. P. Parry, and return card requested, that the registry charge on said letter was prepaid, and that the same was deposited in the United States Postoffice at Boise, Idaho, on December 20, 1928, by affiant herein, and that said defendants and said attorneys were so served on the 20th day of December, 1928, with said papers, as aforesaid; that affiant herein, attorney for said supplemental complainant, resides at Boise, Idaho, and that said attorneys for said defendants and intervenors reside at Twin Falls, Idaho; that there is a regular United States mail

route between Boise, Idaho, and Twin Falls, Idaho, with daily mail service.

J. B. ELDRIDGE,

Subscribed and sworn to before me this the 20th day of December, 1928. C. H. ROBERTS,

(SEAL) Notary Public for Idaho
Residence, Boise, Idaho

Endorsed: Filed Dec. 20, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

ORDER.

SETTLING RECORD ON APPEAL.

Upon stipulation of the parties, submitting to the Court the determination of what documents and papers shall constitute the record on appeal and to be incorporated therein, and the further determination of the objections to respondents' supplemental præcipe,

IT IS HEREBY ORDERED, that the following documents and papers and record shall be incorporated by the Clerk of this Court in the record on appeal:

1. Notice of motion and motion, filed Dec. 7, 1927, for an order permitting the supplemental complaint to be filed, and the supplemental bill and all exhibits attached thereto.

2. Objections to motion or petition, filed Dec. 20, 1927, and all exhibits attached thereto.
3. Affidavit of E. A. Walters, and all exhibits attached thereto, filed on the motion, and all exhibits presented and filed on said motion, including Exhibit "G" presented by defendants on objections, of date July 27, 1921, between the Twin Falls North Side Land & Water Co. and the North Side Canal Company, Limited.
4. Memorandum decision of the Court, filed February 6, 1928.
5. Order denying application to file supplemental bill of complaint of Feb. 6, 1928.
6. Second notice or application, filed Aug. 29, 1928, and all exhibits attached to and presented therewith.
7. Stipulation settling case for judgment of December 18, 1917.
8. Agreement of July 27, 1921, between the Twin Falls North Side Land & Water Co. and North Side Canal Company, marked Exhibit "F".
9. Objections to second application filed Sept. 21, 1928.
10. Last memorandum decision of the Court, filed Oct. 3, 1928.
11. Order of the Court denying the right of supplemental complainant to file his sup-

plemental bill of complaint, with exceptions allowed, filed October 3, 1928.

12. Order of the Court of December 21, 1928, allowing all exhibits attached to the objection to application for permission to file supplemental bill in intervention by certifying up as exhibits by the Clerk and the same be incorporated in the transcript on appeal.

13. Last or final amended bill in equity.

14. Last or final bill of intervention.

15. Last or final separate amended answer of Continental & Commercial Trust & Savings Bank.

16. Last or final separate amended and supplemental answer of Twin Falls North Side Land & Water Co.

17. All papers filed in connection with petition for appeal.

Dated: Boise, Idaho, January 29, 1929.

(Sgd.) CHARLES C. CAVANAH,
District Judge

Endorsed: Filed Jan. 30, 1928.
W. D. McREYNOLDS, Clerk.
By M. Franklin, Deputy.

(Title of Court and Cause)

STIPULATION.

IT IS HEREBY STIPULATED by and between D. L. McClung, supplemental complainant and appellant, and the defendants and respondents in the above entitled cause, that in addition to the papers heretofore ordered by this Court to be sent up on appeal as exhibits, that the following named papers be also certified up by the Clerk as exhibits in said cause: Last or Final Amended Bill in Equity; Bill in Intervention; Separate Amended and Supplemental Answer of Twin Falls North Side Land and Water Company; Separate and Amended Answer of the Continental and Commercial Trust and Savings Bank.

IT BEING FURTHER STIPULATED AND AGREED that no Answer was filed to the Bill in Intervention on account of the stipulation for decree filed in said cause.

IT IS FURTHER STIPULATED that the Court may make an order pursuant to this stipulation for the certification of said papers as Exhibits in said cause.

Dated this 5th day of February, 1929.

J. B. ELDRIDGE

Attorney for Supplemental Complainant and Appellant.

WALTERS, PARRY AND THOMAN,
E. A. WALTERS,
R. P. PARRY,
J. P. THOMAN,
Attorneys for Defendants and Respondents.

Endorsed: Filed Feb. 5, 1928.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

ORDER.

D. L. McClung, supplemental complainant and appellant, and the defendants in the above entitled cause having stipulated that the Last or Final Amended Bill of Equity, Bill in Intervention, Separate Amended and Supplemental Answer of Twin Falls North Side Land and Water Company, Separate and Amended Answer of the Continental and Commercial Trust and Savings Bank may be certified up by the Clerk of this Court as exhibits in said cause.

WHEREFORE, IT IS ORDERED, That said papers be certified up by the Clerk of this Court as exhibits in said cause without the necessity of incorporating the same in the Transcript on Appeal.

Dated this the 5th day of February, 1929.

CHARLES C.CAVANAH,
District Judge

Endorsed. Filed February 5, 1929.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 123, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as directed by order of the Court upon settlement on stipulation of counsel herein.

I further certify that the cost of the record herein amounts to the sum of $143.10, and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this 25th day of February, 1929.

(SEAL) W. D. McREYNOLDS, Clerk.

No. ......

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

J. B. ELDRIDGE,
Solicitor for Appellant.

Filed ...., 1929.

....Clerk.

AL KENNARD PRESS

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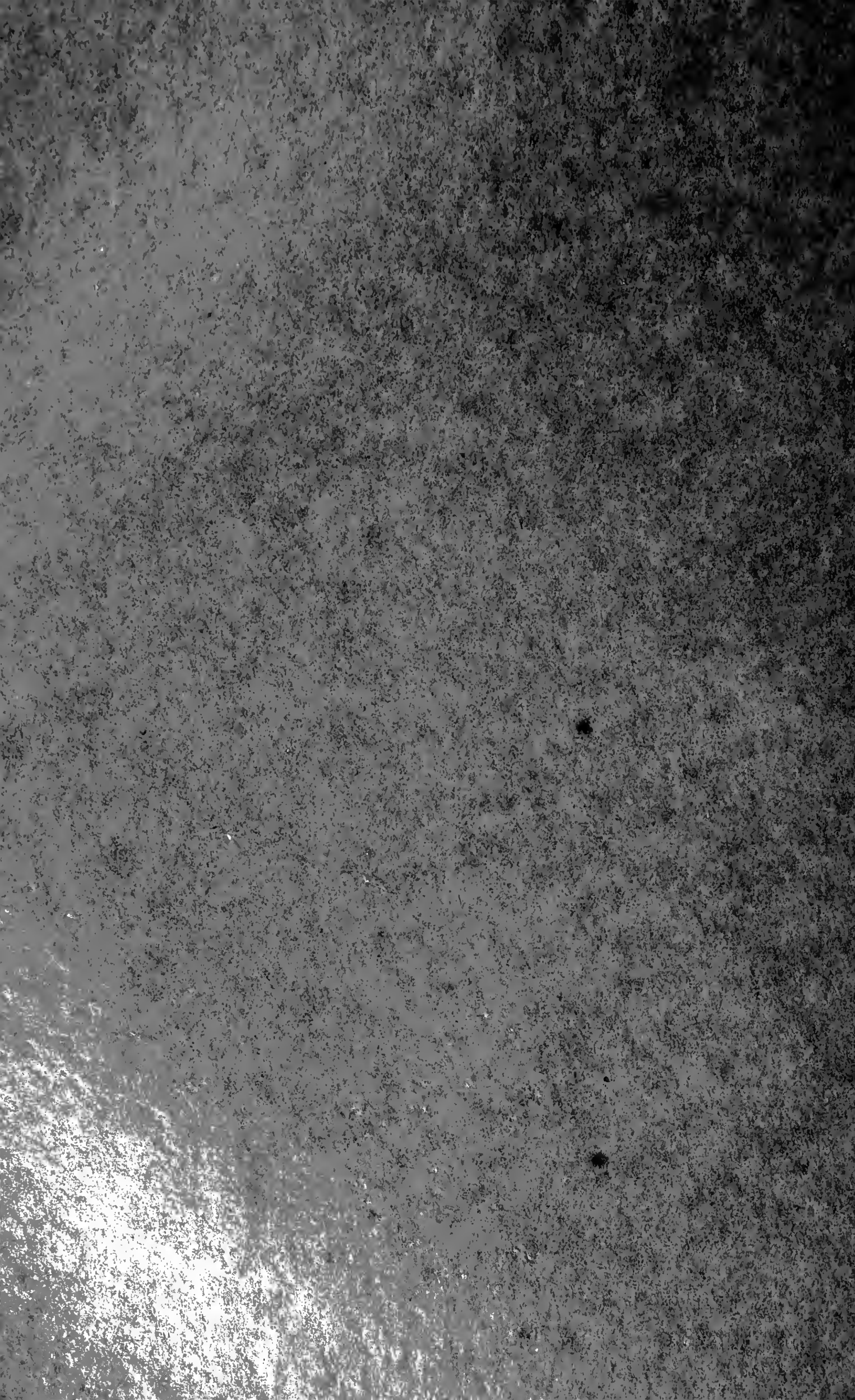
PAUL P. O'BRIEN



No.....................................

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Filed.., 1929.

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees.

BRIEF OF APPELLANT

STATEMENT OF THE CASE

Two motions were made in this cause for an order permitting the appellant to file a supplemental bill in the case of Oliver Hill, et al, vs. Twin Falls North Side Land & Water Co., et al, defendants, and Robert Rogerson, et al, intervenors. The motion set out the proposed supplemental bill as grounds. (Pages 8 to 36, inclusive, Tr.).

The first motion was based upon the contents of the supplemental bill. The supplemental bill sought to be filed, among other things alleged that a bill in intervention was filed in said cause on behalf of the supplemental complainant and that supplemental complainant was the owner of a water right under stock certificates and contracts on the North Side project. That the supplemental complainant performed all the obligations on his part under said contracts for the purchase of a water right and offered to do equity. (Page 11 Tr.). That in said Oliver Hill case a stipulation for decree was entered into and decree entered thereunder, and under the terms of said decree the North Side project was limited to 170,000 shares represented by a like number of acres. This grew out of the insufficient water supply for the project and incompleted works. (See Decree, pages 23 to 26, inclusive). It is further alleged that the Land & Water Company was offering to sell 15,000 additional shares representing 15,000 additional acres to be watered on the North Side project making 185,000 acres in all, and that the canal system was, in fact, not capable of furnishing water to more than 163,080 acres. (Page 13 Tr.).

The supplemental complainant sought the relief of the court to be permitted to file a supplemental bill and that the Land & Water Company be restrained and enjoined from selling any further shares so as

to cause a division of the already inadequate water supply; and that the Land & Water Company be required to complete the irrigation system in conformity with the state contracts; and that the court appoint someone, if it be deemed expedient, to take charge of the irrigation works and complete it at the expense of the Land & Water Company so as to make it possible to deliver water to 170,000 acres as the decree called for.

The United States Court in the Oliver Hill case in its decree forming a part of a supplemental bill tendered, set out that the state contracts should be fully complied with (page 23 Tr.) which state contracts for the construction of the North Side project provided that individual contracts should be made between the water users and the Land & Water Company, and for a certificate of stock to be issued to each land owner defining the water right and interest in the system of each land owner. The individual contract, Exhibit "C" to the supplemental bill (pages 26 to 34, inclusive, Tr.), and the certificate of stock, Exhibit "D" to the supplemental bill (pages 35 to 36 Tr.), define the amount of water right to be 1-80th of a cubic foot for each acre and a proportionate interest in all of the irrigation system and works.

The Federal Court in said decree, Exhibit "B" to the supplemental bill, in addition to providing that the state contracts should be fully complied with, re-

duced the acreage to 170,000 acres and to 170,000 shares as the amount that might be sold, and made further provisions therein,

> "That if at any time in the future, the construction company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor will serve or *can be made to serve without violating the settlers' contracts* more than 170,000 acres of land, and if the construction company is then unable to agree with the said canal company as to what excess, if any, may be served, then and in that event and so often as such may be the case the construction company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judicially determined." (Page 25 Tr.).

The court further decreed:

> "That the several contracts between the State of Idaho and the construction company * * * shall be binding and of full force and effect as between all parties concerned therein." (Page 26 Tr.).

Notice was duly served and both of the defendants appeared in said cause by their counsel, Walters and Parry, and objection was made to the filing of the supplemental bill (pages 36 to 41, inclusive, Tr.) upon the grounds: First, that the court was without jurisdiction. Second, that it presents to the court a different cause of action than that set forth in the

original bill, and involved different parties than those who were parties to the original bill. Third, that McClung was not a party to the original action nor a successor in interest of any such party, and that the identical question involved was pending in a state court wherein McClung was plaintiff and the Land & Water Company and other defendants, in which it was shown that an action was filed asking to cancel the contract authorizing the sale of 15,000 additional shares of the canal company representing the water right for 15,000 additional acres. The objection was supported by an affidavit by E. A. Walters, Esquire, except as to the status of McClung, (pages 42 and 43 Tr.) to which was attached a copy of the complaint of the action pending in the District Court for Jerome County. Upon the showing made, the court rendered a memorandum decision February 6, 1928 (pages 44 to 52, inclusive, Tr.) in which the motion to file a supplemental bill was denied. The court denied the motion chiefly upon the ground that under the terms of the Federal decree in the Oliver Hill case,

> "The right was there given to the defendant company to sell and keep sold 185,000 shares of the capital stock of the canal company because the parties interested agreed to allow the company to sell and dispose of the 15,000 shares of stock in addition to the stock then sold and outstanding."

The trial court further held that the steps provided for to be taken in the decree were taken by the parties affected by the decree, and that the North Side Canal Company represented its stockholders, including McClung, in making the contract allowing the company to sell additional 15,000 shares of stock. (Page 49 Tr.). And the court further held (near the bottom of pages 50 and 51 Tr.) that the Land & Water Company and Canal Company had agreed that the irrigation system had been greatly enlarged and the capacity increased so that the additional water might be supplied "without violating the terms or provisions of the settlers' contracts." The court further held that the controversy between McClung, a stockholder of the North Side Canal Company, and the state as to whether or not the agreement of July 27, 1921, referred to, was fraudulent or unwise has no relation and is not germane to the original bill and decree, and for the foregoing reasons denied the right to file the supplemental bill. The denial was made, however, without prejudice. (Page 53 Tr.).

A new motion was filed (pages 54 to 101, inclusive, Tr.) which includes the proposed supplemental bill together with the exhibits attached to it consisting of the proposed supplemental complaint, stipulation for decree in the Oliver Hill case, the decree of the Federal Court, order of Commissioner Swendsen of the Department of Reclamation of the State of

Idaho accepting works as completed, contract between the Land & Water Company, Canal Company and the Department of Reclamation of the State of Idaho that 15,000 additional shares representing 15,000 additional acres may be sold.

The second motion being based upon the proposed supplemental bill is in the same form as that of the original supplemental bill until paragraph 15 is reached. Then it is alleged, among other things, that in order to avoid the Federal Decree in the Oliver Hill case, limiting the right to irrigate only 170,000 acres on the North Side project, and at the same time pretending to comply with it, Commissioner Swendsen fraudulently entered his order July 6, 1920, Exhibit "E", finding that the irrigation project had been completed; that this grew out of a wrongful and unlawful conspiracy between the Land & Water Company and Commissioner Swendsen. Then follows further allegations that the Land & Water Company and the North Side Canal Company and Swendsen, in pursuance of said conspiracy set out in paragraph 15, combined and conspired with each other to make the contract of July 27, 1921, Exhibit "F" to the supplemental bill, and falsely and fraudulently recited in the contract that the contract could be entered into "without violating the settlers' contracts" to the end that 15,000 additional acres might be irrigated. And falsely and fraudulently recited in said contract that the sale of additional shares,

> "Shall not be deemed in violation of the provisions of the contract between the Land & Water Company and the State of Idaho, but in compliance therewith."

and that the making of said contract should be in compliance with the decree of the Federal Court in the Oliver Hill case. And falsely and fraudulently recited that the contract may be deemed

> "A stipulation by and between the parties in said suit for the amendment of said decree as herein recited insofar as applicable."

It is further alleged in the second supplemental bill that Swendsen acted beyond the scope of his authority and in violation thereof in making said contract; that said acts and doings were false and fraudulent for the reasons set out in the supplemental bill. It is further set out that the supplemental complainant and those for whom he is acting have never given their consent to the sale of further water rights. It is further charged in the supplemental bill that the North Side Canal Company was without power or authority to further sell water rights for the reason that they were already oversold. It is further charged in the supplemental bill that in order to pacify the water users on the North Side project the settlers were induced and advised to purchase and did purchase 160,000 acre feet more of water from American Falls to augment the already short water supply for the 170,000 acres on the project.

All the allegations particularized since paragraph 15 was referred to here differ from and are in addition to those set forth in the original supplemental bill.

Objection was again made to the filing of the supplemental bill the same as made heretofore to the first supplemental bill and on the additional grounds that the Statute of Limitations had run against the decree of the court. (Pages 102 to 104, inclusive, Tr.).

The court rendered a memorandum decision (beginning at the bottom of page 104 and ending at the top of page 105 Tr.) in which the court decided that the application to file the supplemental bill should be denied for the reasons set forth in its original memorandum opinion, and so provided in its order denying the right to file the bill (bottom of page 105 to top of page 106 Tr.) to which exceptions were taken by McClung and exceptions allowed. (Page 106 Tr.) From that order an appeal was perfected to this court in which it is charged that the court erred in entering judgment or order denying the right of the supplemental complainant and petitioner to file his supplemental bill and praying for reversal. The appeal has been duly allowed, citation issued, praecipe for transcript, certificate of clerk certifying up a number of exhibits as such, to which reference will be made in the argument.

SPECIFICATIONS OF ERROR

I.

The court erred in entering judgment or order denying the right of the supplemental complainant and petitioner in said cause to file his supplemental bill therein.

II.

The court erred in denying the right of the appellant to file his supplemental bill as requested in the last petition upon the grounds set forth in the original memorandum opinion because the original memorandum opinion was not applicable to the additional state of facts set forth in the second petition.

III.

The court erred in holding and deciding that the Canal Company and the Land & Water Company had pursued the remedy provided to be pursued in the decree of the Federal Court in the said Oliver Hill case for the sale of additional shares of stock in that the petition set forth that said agreement was entered into for the very purpose of avoiding that provision of the decree of the court as result of a wrongful and unlawful conspiracy between said parties and in bad faith.

IV.

The court erred in holding and deciding that the

Canal Company and Land & Water Company could legally enter into a contract for the sale of said 15,-000 additional shares while doing so as a result of a wrongful and unlawful conspiracy by means of pretending to comply with the decree of the Federal Court in said cause so as to avoid the force and effect of the same.

V.

The court erred in holding and deciding that the issues raised in the supplemental bill sought to be filed did not relate to and were not germane to the issues set forth in the original bill.

ARGUMENT

Points

The specification of errors, we believe, may be grouped under and argued in the one point.

I.

Did the court err in denying the right of the supplemental complainant to file his supplemental bill under his second petition to so do, and if so, was that denial an abuse of the discretion of the court? It is the view of the appellant that any showing that may be justifiably made in opposition to the right to file a supplemental bill like a demurrer admits all of the allegations of the proposed supplemental bill as being true and all that is required is that a probable

cause exists for granting the motion, and the merits of the proposed bill will not be determined.

Simpkins Federal Practice Law and Equity, Revised Edition, pages 638-639.

"All that the court inquires into on petition to file a supplemental bill is to see whether probable cause exists for granting the leave and whether the petition states facts or circumstances which if properly pleaded would sustain a supplemental bill."

Parkhurst v. Kingsman, 18 Fed. Cases, page 1203, No. 1075.

Oregon and Transcontinental Co. v. Northern P. R. Co., 32 Fed. 428.

The fact that it may be necessary to bring in new parties or that rights have changed by transfer of interest or that there is no longer a diversity of citizenship cannot be urged against the filing of the supplemental bill.

Root v. Woolworth, 150 U. S. 401, 37 Law Edition 1123.

Central Trust Co. New York v. Western N. C. R. Co. et al, 89 Fed. 24.

The Milwaukee & Minnesota R. R. Co. v. Chamberlain, 6 Wall. 748, 18 Law Edition 859.

Simpkins Federal Practice Revised Edition, page 640.

The supplemental bill will be allowed as readily after decree as before it.

Simpkins Federal Practice Revised Edition, page 637.

The most comprehensive and best reasoned case perhaps ever decided by any court on the subject of a right to file a supplemental bill and its functions is that of Root v. Woolworth, 150 U. S. 401, 37 Law Edition 1123, in which, among others, the following principles were settled which have been followed ever since the rendition of said decision in practically every jurisdiction in the United States, both state and federal.

FIRST: That any party to an action or successor in interest to a party have the right to file a supplemental bill where otherwise entitled.

SECOND: That a supplemental bill is available for bringing in new parties.

THIRD: That a supplemental bill will be resorted to for the enforcement of an original decree and is ancillary.

FOURTH: That persons who were not parties to the original case may avail themselves of a supplemental bill for the protection of their rights.

FIFTH: That diverse citizenship does not in any manner effect the right to file the bill.

SIXTH: That a court never loses jurisdiction to enforce its own decrees.

In the first petition no allegation was set forth of

any scheme or conspiracy being entered into for the purpose of avoiding the decree of the Federal Court in the Oliver Hill case while pretending to comply with it. (Pages 9 to 16, inclusive, Tr.). In response to which the court in denying the right to file the supplemental bill held, among other things, that he would not permit it to be filed for the reason that the parties had followed the course laid down in the decree of the court for arriving at the right to make further sales (pages 44 to 52, inclusive, Tr.) but denied the right without prejudice. (Page 53 Tr.).

A new supplemental bill was tendered (pages 55 to 67, inclusive, Tr.) in which it was set out that a wrongful and unlawful conspiracy was entered into by the defendants and the Commissioner of Reclamation of the State of Idaho in which the Commissioner of Reclamation would accept the irrigation works as completed and in which a contract was made for the sale of 15,000 additional shares representing 15,000 additional acres of land, to which was attached the contract sought to be canceled by the action pending in the state court by D. L. McClung and others, and that said contract and the acceptance of the irrigation works was made for the very purpose of avoiding the force and effect of the federal decree in the Oliver Hill case while pretending in bad faith to comply with it; all of which was made as a part of the showing in the new supplemental bill tendered.

The court in denying the right to file the supplemental bill did so upon the same grounds forming a basis for his denial of the first petition to file a supplemental bill. It is not believed that the decision of the court was at all applicable to the second supplemental bill for the reasons that the allegations are wholly different in the second from the first as the first contained no reference whatever to any scheme to, by means of fraud and conspiracy, avoid the force and effect of the federal decree in the Oliver Hill case, while pretending to comply with it.

For that reason it seems to us clear that the trial court erred in denying the right to file the second supplemental pleading. (See last decision of Trial Court, pages 104-105, Order of Court, pages 105-166, Tr., to which exception was allowed).

An examination of the amended complaint and complaint in intervention in the Oliver Hill case, sent up as exhibits by the clerk, discloses that the controversy in the original case was over the right to sell more water than was available for the land and for the enforcement of the state contracts. The federal court decreed that the state contracts should be enforced and that no further rights beyond 170,000 acres should be sold unless the parties should agree that they could do so "without violating the settlers' contracts." McClung sets up in his supplemental bill that the parties did agree that they could

do so "without violating the settlers' contracts" but in coming to that conclusion they acted fraudulently and as a result of a wrongful and unlawful conspiracy between themselves so as to override the force and effect of the federal decree while claiming to comply with it, and he set out in what way the federal decree would be violated; namely, on the ground that there was not sufficient capacity nor water to supply the 170,000 acres, much less more.

But we are confronted with the proposition that there was another suit pending to cancel this contract by the supplemental complainant, and that is his defense. In the first place, that case was never tried in the trial court, by agreement, pending a decision in what is known as the Vinyard case by the Supreme Court of the State of Idaho. The Vinyard case was decided just a few days ago and will be brought to the attention of this court as soon as reported wherein the Supreme Court of Idaho held that there is a water shortage on the North Side project of 155,000 acre feet on the second and third segregations alone, and if there were a shortage, and the court so held, why should 15,000 additional shares more representing 15,000 additional acres be sold? Certainly it cannot be done without violating the federal decree and without violating the settlers' contracts.

RELATION OF SUPPLEMENTAL BILL TO ORIGINAL CASE.

As heretofore stated, the original action was to prevent the selling of more water rights than there was water. The supplemental bill alleges a scheme for accomplishing that very purpose but in direct violation of the decree of the court by pretending to comply with it, hence it must be germane for it relates directly to the same subject. It seems to us that when the trial court holds the subject matter of the second supplemental bill as being germane and denies the right to file upon that ground it clearly committed error.

A supplemental bill is an independent aid to the original decree of the court.

> Simkins Federal Practice Revised Edition, pp. 634-635.

And it will be allowed as readily after decree as before.

> Simpkins Federal Practice Revised Edition, p. 637.

New parties may be brought in.

> Simkins Federal Practice Revised Edition, pp. 640-641.

The supplemental bill is merely a continuation of the original and is only required to relate to it.

> Simpkins Federal Practice Revised Edition, p. 642.

Then we have bills in the nature of supplemental bills.

Simkins Federal Practice Revised Edition, pp. 644-646.

In the citations above given an exhaustive treatise of the subject will be found.

ADJUDICATION OF MERITS

We urge that when the trial court found that the parties had pursued the remedy provided for in the federal decree in the original case entitling them to sell additional water rights, a final adjudication of the matter on the merits was in fact had and made by the trial court.

In Rosemary Manufacturing Company v. Halifax Cotton Mills, Inc., 266 Fed. 363, the Circuit Court of Appeals for the Fourth Circuit laid down the rule:

> "The trial court will be considered to have abused this discretion when the appellate court is clear in its own conviction that the action of the trial court was based on a material error of law, or will result in denial of a fair trial in a matter of consequence for which the moving party can have no adequate redress in another proceeding.
>
> If the District Court in the case before us had refused to allow the supplemental bill to be filed solely on the ground that the device in the

> suit did not show invention, and the plaintiff had no other remedy, we think the order would be appealable."

It seems to us that an examination of the decision of the trial court clearly disclosed two things. First, that the trial court considered the motion to file the supplemental bill and the supplemental bill on the merits of the controversy, and rendered a final decision which may be set up as a bar to any future action if the judgment of the trial court stands. Why? For the reason that the trial court judicially determined upon the showing made, and all the showing was made that can ever be made, that the parties found they could sell additional water rights without violating the settlers' contracts and that in so finding they have not run counter to the original federal decree; and thus the trial court adjudicated and determined that the parties had followed the course set out in the federal decree for arriving at that matter, and that we are in no position to complain of it. This being true, it does seem to us that that is a final determination of the matter and we fear may be set up as a bar to any future suit involving that point.

We fully realize that the matter of refusing to permit a supplemental bill to be filed rests in the discretion of the trial court, but that discretion, all of the decisions recognize, may be abused and we urge in this particular instance that it was so abused.

In the very late case of United States v. Carbon County Land Co. et al, the Circuit Court of Appeals for the Eighth Circuit, 9 Fed. 2d Edition 517, reversed the District Court for the District of Utah in refusing to permit a supplemental bill to be filed, and in column 1 at page 519, said:

> "The suit is in aid of the former decree, to obtain the benfits of that decree. As to Carbon County Land Company, it is a supplemental bill, or (more properly according to Story) an original bill in the nature of a supplemental bill, and is proper where new interests arise or where relief of a different kind from that obtainable under the first suit is required, and it may be filed either before or after a decree. Root v. Woolworth, 150 U. S. 401, 14 S. Ct. 136, 37 L. Ed. 1123; Shields v. Thomas, 18 How. 253, 262, 15 L. Ed. 368; Thompson v. Maxwell, 95 U. S. 391, 399, 24 L. Ed. 481; Story's Equity Pleading 338, 339, 345, 351b, 355, 429, 432. Cooper on Equity Pleadings says (pages 74, 75):
>
> "But a supplemental bill may likewise be filed for the purpose of stating events which have happened subsequent to the decree. * * * But this bill though it is supplemental in respect of the old parties and the rest of the suit, yet to any new party brought before the court by it, and consequently in regard to its immediate operation, it has in some degree the effect of an original bill."

The same authority, on page 98, in reference

to bills, not original, to carry a decree into effect, says:

> "The necessity for this kind of a bill generally arises where persons who have obtained a decree have neglected to proceed under it, in consequence of which their rights under it have become embarrassed by subsequent events. * * It may be brought by or against a person claiming as assignee of a party to the decree. So an original bill to execute a decree against a purchaser who claimed under parties bound by that decree, was allowed to be a good bill on demurrer.' "

The supplemental complainant, among other things, prayed that an order for process be issued and the North Side Canal Company be brought in as a party defendant and that the Land & Water Company be restrained from further selling of shares and be required to complete the system so as to furnish water for 170,000 acres.

In referring to the provisions of the original decree providing that the parties may agree upon selling further water rights, and in the event they cannot agree, an action be brought in a court of competent jurisdiction, the trial court said:

> "There is no dispute as to the execution of the agreement referred to. It would seem that at the present time there is no question under the decree to be adjudicated, as the parties have agreed in the manner directed in the decree." (Page 49 Tr.).

It would seem that when Judge Dietrich made provision for an agreement between the parties to sell further shares, he did so contemplating that the parties would act in good faith and would not enter into an agreement as a result of an unlawful conspiracy to cheat and defraud the then existing stockholders of the North Side Canal Company. Now when we set out a contract in the second application to file a supplemental bill in which it is alleged that the contract was made for the very purpose of avoiding the provisions of Judge Dietrich, it would certainly seem that the issues raised in the supplemental bill cannot be said to be not germane but directly relate to the original complaint and to the decree founded upon it, and that the trial court did abuse its discretion and did pass upon the merits of the controversy adversely to the supplemental complainant. And finally, we urge upon this court that the order of the trial judge should be reversed and the supplemental complainant should be given opportunity to present his case.

It seems clear that when the McClung case is brought on for trial in the state court involving different issues and between different parties, we may be confronted with the decision of Judge Cavanah that insofar as McClung is concerned, it was determined by the Federal Court that the remedy provided in the Judge Dietrich decree was followed, and

that that was finally determined and is res adjudicata as to him.

It would seem without argument clear that it is the duty of courts to protect their own jurisdictions and their own decrees from any wrongful and unlawful schemes for the purpose of thwarting and defeating them.

It will be noted that in the objections it was contended that McClung was not a party for whom the original complaint in intervention in the original case was made, but Judge Walters in his affidavit did not make that contention, hence that point certainly should not be considered if otherwise available for there is nothing in the record to support it. McClung in his verified supplemental bill set out how and why the action was brought for him under which the original federal decree was rendered, and that should prevail against no showing whatever to the contrary.

But we are again told that there is another action pending in the state court. It will be remembered that the original case was decided in the the Federal Courts, long before the McClung case was filed in the state court and it is clear that the Federal Court has never lost its jurisdiction to enforce its decree by means of supplemental bill. That the trial court found to be the case. Hence the fact that McClung filed a case in the state court involving different par-

ties which has been pending the outcome of a case in the Supreme Court, conducted by Vinyard, involving water rights on the North Side project, which case has just been decided and, as heretofore stated, a large water shortage found to exist, is no reason why a supplemental bill should not be allowed in the original case.

Adverting to Rosemary Manufacturing Company v. Halifax Cotton Mills Company, Inc., supra, 266 Fed. 363, the doctrine laid down in that case is applicable here, we believe, to the effect that an abuse of discretion will be considered and for the purpose of illustrating the difference between abuse and non-abuse of discretion. The court in that case said at page 364:

> "The District Court refused the application for leave to file the supplemental bill, saying its refusal was 'mainly because of its belief that the accomplishment of plaintiff's assignor (the patentee) does not show invention.' "

Then the court further says that the holding that the "supplemental bill does not show invention" is not an adjudication of that point or of its merits in any respect. With this we fully concur for the reason that the court did not say that there is and was no invention, *but merely that the supplemental bill did not show it;* while in the case at bar the trial court said that in making the contract for the sale of 15,000 additional acres the original decree of the

Federal Court was complied with and that no further litigation was necessary. This was an absolute determination, it seems to us, of the point involved; namely, did the parties in spite of the allegations of the supplemental bill comply with the decree of the court when they made the contract for a further sale of water rights, or was it done as a result of a wrongful scheme to avoid the effect of the original decree of the Federal Court while pretending to comply with it?

The trial court, it seems to us, adjudicated that the original decree was complied with when the contract was made thereby determining the matters on the merits without taking testimony, without leave to file a supplemental bill, and in derogation of every rule forbidding the trial on the merits of a controversy on application to file a supplemental bill, and therefore we urge a clear abuse of discretion.

Respectfully submitted,

J. B. ELDRIDGE,

Solicitor for Appellant.

NO. 5540

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST and SAVINGS BANK, a Corporation, Trustee.

Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division

WALTERS, PARRY and THOMAN,
E. A. WALTERS,
R. P. PARRY,
J. P. THOMAN,

Solicitors and Attorneys for Appellees.

Filed ________________________________, 1929.

________________ ________________Clerk.

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STATEMENT OF FACTS

This is an action involving the number of acres of water rights to be sold and the state of completion of an irrigation project in the State of Idaho. The project in question is what is commonly known as a Carey Act project, made feasible in the first place through the provisions of those certain statutes of the United States com-

monly known as the Carey Act, and the statutes of the State of Idaho accepting and carrying into force and effect the terms and provisions thereof. The State of Idaho under and by virtue of the provision of its statutes (Section 2996 to 3074 inclusive, Idaho Compiled Statutes, 1919), has and does act both on its own behalf, as the owner of the water under its State Constitution, and as the representative of the settlers. In such dual capacity it is a necessary party to all contracts and proceedings relating to the extent of and ultimate completion of the system. That is, that State, in the beginnig, in accordance with the statutes, entered into a contract with the Twin Falls North Side Land & Water Company, (hereinafter for brevity called the Land & Water Company), for the construction of the system and from time to time thereafter, as any contracts or changes or alterations in contracts were required, entered into additional agreements.

Since this motion is presented solely on the pleadings, motions and affidavits it does not seem necessary to enter into a detailed account of the facts involved. The original contracts for the project were made in the year 1907, and thereafter actual construction work began and water contracts were sold to various individual entry men, who had entered tracts of land on the project. Along in 1914, and before the completion of the project, W. S. Kuhn & Company, the financial backers of the Land & Water Company, failed for a sum in the neighborhood of $75,000,000 and the Land & Water Company fell into serious financial difficulties, among other things defaulting on its bonds. The irrigation system was at that time, and for some time thereafter, in an uncompleted stage. While

this condition of affairs existed the persons owning the defaulted bonds organized and took over the project.

In 1917 the settlers became fearful that the bond holders would simply collect as much as possible on the outstanding water contracts and sell as many other contracts as possible, but would not complete the irrigation system or provide an adequate water right. To prevent this, the settlers at this time, acting through one Oliver Hill and others, filed this original action in the United States District Court in Idaho, to prevent further sale of water rights and to insure the completion of the system as provided in the original contracts.

The result of the action was that the parties stipulated that a decree should be entered limiting, for the time being the sale of water rights to a total of 170,000 acres and providing, (most important of all under the existing circumstances) that the Land & Water Company should proceed to the completion of the system to the point where it would be accepted by the State of Idaho in accordance with the terms and provisions of the contracts providing therefore. It is this old action that the present appellant is trying to "tie onto" another and separate controversy arising many years afterward.

The stipulated decree in that suit appears in the present record as Exhibit B to appellant's second proposed supplemental bill (Tr. pp. 73-77), and is referred to throughout appellant's brief as the federal decree.

We think it would perhaps assist the court in understanding the present situation to set out briefly the chronology of events since the entry of the federal decree:

December 20, 1927—Entry of federal decree. Dietrich decree).

August 6, 1920—System accepted by State of Idaho as completed in accordance with the terms of the contract (Tr. pp 77-86).

July 27, 1921—Land & Water Company and Canal Company contract that maximum sale of water rights be fixed at 185,000 (Exhibit F to Second Supplemental Complaint, (Tr. pp 87-101)).

November 8, 1921—Action filed in State Court by this appellant to attack validity of above contract and enjoin sale of more than 170,000 acres of water rights, (Tr. pp 42-43 and original Exhibits to affidavit of E. A. Walters forwarded to clerk of this court).

December 7, 1927—First Supplemental bill tendered in this action.

August 29, 1928—Second Supplemental Bill tendered in this action.

POINTS

I.

The proposed second supplemental bill presents a controversy which has no relation to, and is not germane to the original bill and decree; and which is entirely separate from, foreign to, and independent of the original controversy; and which requires the judicial determination of facts and situations which have arisen long after the entry of the original decree.

II.

The court did not abuse its discretion in denying appellant the right to file his second supplemental bill.

(A) There was, and is, another action pending in the State Court of Idaho, between the same parties and the other necessary parties, presenting the same issues.

(B) The cause of action attempted to be set out in the supplemental bill is barred by the statute of limitations of the State of Idaho.

(C) The action presents very important questions relative to alleged fraudulent acts of state officials and corporation officials which should not be and could not be determined in a summary ancilliary proceeding.

(D) The controversy proposed in the supplemental bill is futile for the reason that even if the contract be decreed void, the parties must necessarily be relegated to the procedure specifically provided for in the Dietrich decree.

III.

The proposed supplemental bill does not bring in as parties, those who are necessary parties for a complete judicial determination of the questions presented.

IV.

The court in the Dietrich decree did not retain jurisdiction over the matters attempted to be presented in the supplemental decree, but particularly provided other and different means for the settlement thereof.

V.

There was no adjudication of the merits of the controversy by the court below.

ARGUMENT.

The questions of law presented by this appeal are not at all difficult or intricate. The gist of the trial court's decision on both of the proposed Supplemental Bills was that the cause of action therein attempted to be presented was not germane to the original action and that therefore the present appellant was not entitled to file them in this action.

In our opinion then, the first step for this court is for itself to examine the issues presented by the original action, the decree entered and then the cause of action attempted to be presented in the Second Supplemental Bill. If this court determines that the Supplemental Bill is not germane to the original action, but presents a new, separate and different cause of action, that ends the investigation of the appeal for the order of the trial court must necessarily be upheld.

On the other hand, even if this court should differ with the trial court and determine that the cause of action proposed in this Second Supplemental Bill is germane to the original action, there still remains the question as to whether or not the trial court abused its discretion in refusing to allow appellant to file his Second Supplemental Bill. It must be conceded by all that even though a proposed supplemental bill be germane to the original action, it still lies within the discretion of the trial court whether the bill may be allowed to be filed. Appellant concedes this in his brief. There are some other objections which we believe prevent the appellant filing his proposed Supplemental Bill, which we shall

hereinafter mention, but as the appellant has presented the matter in his brief these two questions would seem to be determinative of the appeal.

SECOND SUPPLEMENTAL BILL IS NOT GERMANE TO ORIGINAL ACTION

The original plan was that the Land & Water Company should sell water rights for 200,000 acres and the amended bill in equity (sent up as an exhibit in this case) alleged that in 1917 the Land & Water Company had sold about that many acres and that the System was not completed and would not be by the Land & Water Company so completed. The decree entered by Judge Dietrich, then sitting as a District Judge, provided substantially two things, (a) that for the time being, the Land & Water Company should only sell and keep sold 170,000 acres of water rights and (b) that it should proceed to complete the system in accordance with its contracts with the State of Idaho, and procure the acceptance of the same by the proper officials of the state. That is, the parties agred by the stipulation, and the decree in effect found that if and when the system was completed as provided in the contracts pertaining thereto, that it would adequately supply a minimu of 170,000 acres. To that extent the Dietrich decree is res judicata, other than that it is not.

But even at that time it was within the contemplation of the parties that eventually the system might be constructed by the Land & Water Company, with a larger capacity and with more water available than was contemplated in the original contracts. Having this in mind the Dietrich decree contained language, *which is all im-*

portant in its bearing on the question now presented to this court, and which is as follows:

> "That, if at any time in the future the Construction Company, its successors or assigns, shall conclude that the said irrigation system and the water supply therefor, will serve, or can be made to serve, without violating the settlers' contracts, more than 170,000 acres of land, and if the Construction Company is then unable to agree with said Canal Company as to what excess, if any, may be so served, then and in that event, and so often as such may be the case, the Construction Company, its successors or assigns, may bring an action in any court of competent jurisdiction to have said question judicially determined; and the question as to where the water must be measured to the contract holder under his contract with the Construction Company, and the question as to how much water must be so measured, thereunder for the purpose of determining what acreage may be irrigated above said 170,000 acres, are not covered or affected by this decree."
> (Tr. p. 76).

Viewing the Dietrich decree as a whole then, it would seem that only one question was finally determined, namely that if and when the system was completed in accordance with the State contract, it would be sufficient to irrigate 170,000 acres. On this point, the decree was final and was intended so to be and the Court did not retain any further jurisdiction over the matter.

One of the other questions present in the minds of the parties to this suit was who was to be the judge as to the completion of the system. On this point the decree provided (Tr. p. 74) that the settler should be relegated

back to his contract rights, by providing that the party to accept the irrigation system as complete should be the State of Idaho through its proper officers. Or, in other words, that it should be finally accepted by the same party as the one to be satisfied under the contracts between the Construction Company and the State of Idaho. On this point, too, the decree was final. That is, the Court did not retain any jurisdiction to itself thereafter to pass upon the completion of the system.

The third point in the minds of the parties was what would be the maximum acreage of water rights to be sold, if the Land & Water Company should construct the system to a capacity and with available water over and beyond that contemplated in the original state contract. Bear in mind that under the original contract it was thought that the system when completed according to specifications would irrigate 200,000 acres, but under the Dietrich decree it was decided that as far as the parties then knew this would only supply 170,000 acres. But the Land & Water Company was still contending strenuously that it could and would build a system which would supply water for *more* than 170,000 acres.

The parties by their stipulation, and the Court by its decree, therefore selected the one who was to be the representative of the settlers in future negotiations for fixing the maximum of water rights to be sold. The party so designated by the decree was the Canal Company (Tr. p. 76) i. e. the North Side Canal Company, Limited. The decree contemplated that the action of the Canal Company in so agreeing should be final and that the settlers on the project should be bound by the action of that Company

as their representative. Since the present appellant insists that he is a successor to some of the parties to the original suit, he therefore is bound by that provision of the decree.

It was then further provided that if the Land & Water Company and the Canal Company could not agree [they *have agreed* as is shown by the Second Supplemental Bill and particularly Exhibit F thereto (Tr. p. 87-101)], that *the Construction Company* (the Land & Water Company) could bring a suit *in any Court* of competent jurisdiction to determine the question of the maximum acreage of water rights to be sold. The decree did not contemplate that Court action would be by anyone other than the Land & Water Company; much less that any one of the settlers might raise the question by Supplemental Bills under the decree.

In other words, a complete analysis reveals that the Dietrich decree finally and definitely settled the one question then to be settled, and that by it the Court did not retain jurisdiction over or contemplate that it would have control over any further proceedings. On the contrary, it definitely provided other methods for the determination of such further questions that might arise in connection with the matter.

Having the above in mind, let us observe very briefly what the present appellant is attempting to litigate by his Second proposed Supplemental Bill. In effect, he alleges that the system has been completed and accepted in accordance with the State contracts and that the parties have, in compliance with the terms of the decree, agreed that 185,000 acres of land has been sold. He then

proceeds to claim that this acceptance of the system and the agreement are both fraudulent. He does not allege that the parties have violated the decree—of course, if they had the appellant would have his remedy of proceeding against them for contempt of court. What he actually does is to plead a new and independent action sounding in tort.

The first point raised is the sufficiency of the water supply. The Bill alleges (Tr. p 58, 66) that the present available water supply is notoriously insufficient to supply the amounts already contracted to be supplied to the settlers. We might suggest that in raising this question he is not seeking to carry the Dietrich decree into effect, but instead wants to set aside the very portion of the Dietrich decree that is final.

Necessarily, under a Supplemental Bill, the complainant *must* accept the decree. This is one very apparent reason why the proposed bill is not a proper Supplemental Bill or one in aid of the decree.

The next point attempted to be raised in the Second Proposed Supplemental Bill is that the system has not been completed in accordance with the contracts between the Land & Water Company and the State of Idaho. From the language of the Dietrich decree, and the situation of the parties to the suit is evident that the system was admitedly not completed at the date of that decree and that work still remained to be done upon the system. There fore the Dietrich decree did not and could not determine any future controversy which might arise as to the actual completion. The decree did designate who was to be the judge, namely, the proper officials of the State of Idaho.

The Second Supplemental Bill shows on its face (Exhibit E (Tr. pp 77-87)] that the designtaed party had accepted the system as completed and that the Land & Water Company and the designated representative of the settlers, the North Side Canal Company, have agreed [Exhibit F, (Tr. pp 87-191)] that the system has been more than completed.

A suit of any kind upon the question of the completion of the irrigation system, at a date long after the entry of the Dietrich decree, of necessity seeks to litigate a new question of fact altogther, a question of fact which the Dietrich decree could not pass upon. When the complainant alleges in his proposed supplemental bill that the irrigation system is not completed according to the contracts of the construction company with the State, he says that his rights are not based upon the Dietrich decree but in fact depend upon what has taken place since the entry of that decree. The general purpose of a Supplemental Bill is to carry into effect a previous decree. There is nothing in the Dietrich decree which adjudicates anything else than that the system was not completed at the date of the decree. The question whether the system was complete or otherwise at the date of the proposed Supplemental Bill does not depend upon the Dietrich decree. It is answered yes or no according to the intrinsic facts and not by anything said in the Dietrich decree. We therefore say that carrying the Dietrich decree into effect does not solve for us or for the court the question whether the irrigation system was completed or not at the date of the proposed bil. The Dietrich decree is useless upon that question, and if useless, the complainant's present at-

tempt to revive it ought rightly to be discouraged.

The next allegation of the proposed bill is that the construction company is wrongfully selling water rights for over 170,000 acres of land.

As we have seen, the Second Supplemental Bill shows on its face that the parties have agreed (Exhibit F, to said Supplemental Bill) that there may be sold and kept sold, water rights to the extent of 185,000 acres on this project. Therefore, the allegations in the bill that there is not water enough for such additional land and that there is not increased capacity, does not and cannot allege a violation of the Dietrich decree, but is only an attempt to plead evidence to lay a ground work for and support the oft-repeated legal conclusion that the acceptance of the system as completed (Exhibit E) and the agreement for the sale of 185,000 acrs (Exhibit F) are fraudulent and therefore void. But, at first reading, these allegations seem to plead a violation of the decree as appellant contends for. An analysis of the pleading shows they are only the elements of the fraud he charges in entering into the contract. In other words, the question which he wants to litigate now is not whether the parties are violaing the Dietrich decree, but is solely and only an attempt to litigate a charge prefererd by one settler that the officials of the State of Idaho and the North Side Canal Company, the designated representative of the settlers, have acted fraudulently. These are questions that were undreamed of at the time of the Dietrich decree, and were not in any way considered or decided by Judge Dietrich in entering that decree. Neither was the question whether there is in fact sufficient water, or an en-

larged capacity in the irrigation system, decided in the Dietrich decree, for all those things were matters that lay in the future.

Just as pointed out in our consideration of the previous question, any rights of the complainant to prevent the sale of water rights for land in excess of 170,000 acres does not depend upon any matters finally determined by the Dietrich decree. The complainant must prove that there is insufficient water available to irrigate the additional acreage, as to which there is no possible finding in the Dietrich decree, and also that the irrigation system has not been enlarged to a capacity sufficient to admit of it serving additional acreage over 170,000, upon which point the Dietrich decree could not possibly make any finding. To make a case under this head the complainant must prove new and independent elements not settled by the Dietrich decree. In such circumstances the proposed bill cannot be proper.

The proposed bill seeks to make itself a continuation of the former case by alleging fraud upon the part of those named to act as arbiters for the settlers. It alleges a fraudulent acceptance by the State Commissioner of Reclamation of the irrigation system as complete, and a fraudulent conspiracy of the North Side Canal Company to permit the sale of water rights for more than 170,000 acres. If there is fraud in any transaction under either of those heads it is fraud as to matters of fact since the date of the Dietrich decree. Whether or not the system is completed in accordance with the contracts of the construction company with the State of Idaho, and whether or not the water supply taken in connection with the

capacity of the system will supply over 170,000 are questions which necessarily depend upon the conditions at the time of tendering the proposed bill, and not upon conditions at the date of the Dietrich decree, for the Dietrich decree assumes an incomlete system, with alterations and changes going on and to continue to some time in the future.

Under both charges the complainant must prove more than would be necessary in a mere controversy over whether the system has been completed or not, or over whether water right and canal capacity permit the irrigation of over 170,000 acres. Under the first charge, he must show that the irrigation system at the date of the bill was so far from being completed that there could not be room for an honest difference of opinion upon hat point. Under the second charge, he must show that the water supply and canal capacity is so notoriously inadequate that there could not be any reasonable doubt upon the point. We before said that all these things were matters of fuure development at the date of the Dietrich decree, that the Dietrich decree did not attempt to pass upon them, did not reserve them for future orders, but in fact did the direct opposite by saying that in the event of disputes over the number of acres capable of being irrigated such questions should be settled in another suit, brought by the Land and Water Company.

What is the purpose of a supplemental bill? In Root v. Woolworth, 150 US 401, 14 S.Ct. 136, 37 L Ed. 1123, its purpose is said to be the avoidance of relitigation of questions once settled between the parties. We examine the reported cases upon supplemental bills and find that

the rights sought to be protected by such bills are rights based upon the decree itself, based upon a direct, final adjudication of the court upon matters of fact presented to the court and decided by it in the decree which is sought to be carried into effect, and that in none of them is a supplemental bill permitted to be used to ask a new adjudication upon new facts as to which the former decree is not res adjudicata. These conclusions are drawn from the following cases:

> Root v. Woolworth, supra.
>
> Western Telephone Mfg. Co. v. American Electric Co., 141 Fed. 998.
>
> Central Trust Co. v. Western N. C. R. Co., 89 Fed. **25.**
>
> Milwaukee & Minnesota R. R. Co. v. Milwaukee & St. Paul R. R. Co., 6 Wall. 742, 18 L. Ed. 856.
>
> Independent Coal & Coke Co. v. United tSates, 274 US 640, 47 S. Ct. 714.
>
> Rudiger v. Coleman, 126 NE 723, N. Y.
>
> Austin v. Hayden, 157 NW 93, Mich.

It is our contention that to be a proper supplemental bill the source of the rights of the complainant must be the former dlecree, that the complainant must be able to say to his adversary: "Here is my decree—your acts are in violation of that which this decree has already settled in my favor.' If he cannot say that his rights are settled by the former decree he has no proper supplemental bill.

> "But such bill must, both in a proper and legal sense, be an ancillary bill: it must, in fact, be only a continuation of the original suit, that is, it must relate to some matter already litigated by the same parties or their representatives. If the

bill contains matter not before litigated by the same parties standing in the same interests, that is, if new parties are brought in, and new matter charged as a basis of relief, then the bill is not an ancillary, but original bill, and cannot be supported by the former suit, but must stand independently on its parties and subject-matter for jurisdiction Union Cent. L. Ins. Co. v. Phillips, 41 C. C. A. 263, 102 Fed. 19; Anglo-Florida Phosphate Co. v. McKibben, 13 C. C. A. 36, 23 US App. 675, 65 Fed. 529; Raphael v. Trask, 118 Fed. 777; Campbell v. Golden Cycle Min. Co. 73 C. C. A. 260, 141 Fed. 610; Shinney v. North American Sav. Loan & Bldg. Co. 971 Fed.9"

Simkins Federal Practice, Revised Edition. Pages 756-757.

The Dietrich decree, as before shown, determined the single point that the canal system, if completed according to the contracts of the construction company with the State of Idaho, would in connection with the water right then available, irrigate 170,000 acres of land. Nothing else was adjudicated by such decree. The purpose of the present bill is to present to the court for adjudication the questions whether the canal system is completed as required by such contracts, and whether there has been such an enlargment of the system over such requirements, as would in connection with the water right actually acquired irrigate more than 17,000 acres of land. The Dietrich decree said nothing about the completion of the system; it could not do so, for the system was then admittedly incomplete. This supplemental bill therefore does not depend upon the Dietrich decree, but instead originates an entirely new question.| Likewise that decree could not and did not adjudicte any dispute over whether

there was such an enlargement of the system as would permit more than 170,000 acres of land to be irrigated. In raising that question now, the bill brings up entirely new matter. *No question raised by the supplemental bill was adjudicted by the Dietrich decree.* The relief demanded in that bill must flow from a new adjudication by the court upon new facts, none of which were or could be presented in the former case. It is not relief that is derived from, ancillary to, or dependent upon the former decree. Complainant must bring a new action.

COURT DID NOT ABUSE ITS DISCRETION IN DENYING MOTION TO FILE SUPPLEMENTAL BILL

Thus far in this brief we have discussed the question as to whether or not the proposed Second Supplemental Bill was germane to the original action. Or to put it another way, whether there was such a foundation as would justify the Court in applying its discretion to the matter at all. However, even if this Court should disagree with us on this point and determine that the Bill is germane (which we do not admit), still there was more than ample ground for the trial Court, in his wise discretion, to deny the motion to file the Second Supplemental Bill. That is, rather than there being an abuse of discretion, as appellant argues, it is a case where there would have been much more room for arguing that the Court had abused its discretion if it had granted the motion. But in any view, there was sufficient possibility for a divergence of opinion to make the matter one lying solely in the discretion of the trial Court.

A. *Pendency of Another Action Involving the Same Parties and Issues.*

For instance, one of the first facts to appear when the trial Court studied this matter was that on November 8th, 1921, the same gentleman who is the appellant here, instituted an action in the State Courts of the State of Idaho, involving the same issues as are now attempted to be injected into this action in rather a "side door" manner. This appears in the objection filed by the present appellees (Tr. p 37-38), supported by the affidavit of E. A. Walters (Tr. p 42-43). To this latter affidavit there is attached copies of the complaint and answer in the States Court suit, which have been sent up to this Court as original exhibits by the Clerk of the District Court (Note, Tr. p 43).

It only takes a moment's inspection of these pleadings to see that the State Court action presents the identical issues as those now attempted to be inserted in this action. Further that action is at issue and ready for trial. Also in the State Court action, all possible parties are present in Court so that a complete determinaion of the whole matter may be had in that action at any time the present appellant desires.

Why was not the trial Court, then, exercising its sound discretion when it said in substance to the present appellant, you already have an action pending in the State Court at issue and ready for trial, presenting the same questions, and there is no need for a Supplemental Bill in this action?

B. *Cause of Action Set Out in Supplemental Bill Barred by Statute of Limitations.*

Another excellent reason for the trial Court exercising its sound discretion in refusing the tendered Supplemental Bill is that the cause of action attempted to be set forth is barred by the Statute of Limitations of the Sates of Idaho. This objection was specifically raised by the appellees in their objection to the Second Supplemental Bill (Tr. p 103). The reason that we say this Cause of Action is barred, is substantially this: the present action is in its last analysis nothing more or less than an attempt to have declared void a certain contract between the Land & Water Company, the Canal Company, and the tSate of Idaho, on the ground that it is vitiated by fraud. The Statutes of the State of Idaho are clear that actions founded on such fraud must be brought within three years (Sec. 6611 I. C. S.). Or in any event it is barred by the general Idaho statute providing the four year limitation (Sec. 6617 I. C. S.). The act of the state official in accepting the system occurred August 6th, 1920. The contract in question was signed July 27th, 1921. The prescribed time for bringing an action against either of these acts on the ground of fraud or any other ground had long expired. It is this act and this contract alone that appellant is now seeking to attack.

Appellant attempts to wave this very serious objection aside by stating that the statute of limitations does not run against the decree of a court. Of course, we concede this and would not be so absurd as to contend otherwise. The point is that in this action there is no decree on the issues counsel wants to have litigated and that

the question to be presented to the court, if the Supplemenal Bill be filed, are questions as to the validity of the acts of the State officials and the validity of the contract. Both of these involve the question of fraud and fraud alone, and the time for attacking them on that ground had long expired when the present Bill was tendered.

Can it be said then that the trial court abused its discretion in denying the motion to file the Supplemental Bill where this fact that the action was barred appeared on the face of the Supplemental Bill? Surely the Court is not abusing its discretion when it refuses to take up its own time and that of litigants with an action which is barred on its face.

C. *Important Questions of Fraud Presented Should Not be Tried in a Summary Proceedings.*

Another very cogent reason why the trial court was exercising its sound discretion in denying the right to file the Second Supplemental Bill, is the character of the issues attempted to be presented to the court. The bill makes very serious charges; it charges state officials with gross neglect of duty, conspiracy and actual and deliberate fraud, it charges the officials of the North Side Canal Company, the settlers' operating company, and the Land & Water Company with gross and deliberate fraud. As we understand it, the question of whether or not a fraud is committed, presents a law question. This is an equity case.

These questions of later fraudulent acts are entirely foreign to and independent of the original proceedings, and certainly the trial court is entirely justified in re-

fusing to, itself, dispose of them in a summary proceedings of this character and in refusing to compel the state officials to have the validity of their acts contested without their being present, and the validity of the acts of the North Side Canal Company decided without their having the benefit of a jury trial. It requires only a hasty look at any text book upon the subject, to observe that a Supplemental Bill is designed only to present matters ancillary to the original case. Here the matters presented are serious in their import, entirely foreign to the original action, relate to matters happening long after the original decree, and affect many parties. Counsel has cited no authority and we know of no law which would compel a court to try such a case in a summary proceedings under a Supplemental Bill. Again we say that on this ground, too, the Court exercised its sound discretion in denying the right to file the Supplemental Bill. Especially was this true when there was already pending this action action in the State Court presenting the proper issues and with all of the affected parties present.

D. *Futility of this Proceeding.*

Upon the the oral argument of the last motion, Judge Cavanah, the District Judge, stated in shbstance that in his opinion the only question presented by the Second Supplemental Bill was whether the contract, (Exhibit F) was valid and that even if he should determine that was invalid because of fraud, that then the parties would be relegated back to the procedure specifically provided for in the Dietrich decree. That is, that if in a proper action (the State Court action) the contract is declared void, that then and in that event the question as to the

amount of acreage ultimately to be sold must be judicially determined in a court of competent jurisdiction in an action brought by the Land & Water Company as specifically provided in the Dietrich decree. This observation by the trial court was to our mind, eminently correct and another of the main reasons why he was justified in exercising his discretion as he did.

And the trial court particularly protected appellant's rights in this regard when he provided in his first memorandum decision (Tr. p 52) that he could bring a proper action with all of the parties to the contract present and provided in his order (Tr. p 53) that the motion was denied without prejudice.

Summarizing al of the above matters then, there can be no question that the matter was such that, even if the Supplemental Bill were germane, the sound discretion of the trial court was called into play and that the court had every substantial reason for exercising its discretion as it did.

NECESSARY PARTIES FOR COMPLETE DETER MINATION OF CONTROVERSY NOT PRESENT

The original action was one solely between the settlers on the one hand and the Land & Water Company and the Trustee for its bond holders on the other hand. The fact is inescapable that the present proposed supplemental bill presents an issue as to the validity of a three party contract between the Land & Water Company, the North Side Canal Company and the State of Idaho. The objection that the proposed bill did not bring into court the parties necessary for determination of the matter was

aptly raised by the appellees in their objection (Paragraph 5, Tr. p 41).

It is true that in the second bill the appellant offers to bring in the North Side Canal Company, Limited, if it is deemed necessary. We pass over the questionable efficacy of this method of claiming that the Canal Company has been made a party. Even if it has been there still remains missing the State of Idaho.

The State of Idaho is interested in this action in a dual capacity. In the first place it has a direct and real interest in the action since it involves the application of certain water for irrigation purposes. Under the provisions of Article XV, Section 1, of the Idaho Constitution, it is provided that the use of the water of the State of Idaho is a public use and under the unvaried line of decisions in the State of Idaho, the title to all the water is held to be in the state and that the individual owner has only the right to the use thereof:

> Walbridge v. Robinson, 22 Idaho 236, 125 Pac. 812
> Coulson v. Springfield Aberdeen Canal Co. 39 Idaho 320, 227 Pac. 29.

Therefore in arriving at the final determination as to how many acres of land were to be irrigated with the water available for this project the State was vitally interested. It would not and could not sit by and allow private individuals to restrict the waer to a smaller area than could actually be beneficially irrigated by it.

Further than this, with reference to such Carey Act projects the State of Idaho was the trustee of an express trust under the provisions of the Federal statutes

known as the Carey Act. And by its own statutes (Sections 2996-3074 Idaho Compiled Statutes, 1919), the State retained a direct and specific interest and right of control over the method of construction, extent and state of completion of all Carey Act projects. In view of these statutory provisions it would seem that the State would be a necessary party to the action even if it were not a party to the contract in question.

But we do not need to consider this more or less academic question for the reason that the State of Idaho was a party to the contract, which appellant now claims was fraudulently entered into. It was the state officials who accepted the project as completed, an act which appellant now says was fraudulent. Surely the trial court was well within his right when he held that he would not determine a question so vitally affecting the state and its officials without their being present in court. For the court to have attempted to determine the rights of the State of Idaho, without it being present in court, would of course have been erroneous. To deny a bill which sought to do this could not have possibly been an abuse of discretion.

COURT DID NOT RETAIN JURISDICTION

Another legal reason why the proposed supplemental was not proper is that the court in Dietrich decree did not in any way retain jurisdiction over the matters sought to be presented in the supplemental bill. Reduced to its last analysis appellants theory apparently is that because one phase of the controversy involving the North Side project was determined in this action that thereafter, by a supplemental bill he can have determined

in the case each and all and every controversy arising within the next two decades affecting the same project Not only did the court in the Dietrich decree not retain jurisdiction but it particularly provided other methods of determining these very questions, which appellant now seeks to raise. Since it did not specifically retain jurisdiction over them, appellant has no legal right to now have these other and independent controversies litigated in this action.

NO ADJUDICATION OF MERITS

Apparently as the last desparate attempt to reverse the District Court, appellant contends that there was an adjudication of the merits of the controversy. His argument savors very much of the old time jury expedient of setting up a straw man and then knocking it down. For there is nothing in either the memorandum decisions of the trial court or the orders entered, which in any way purported to be an adjudication of the merits of the case. Appellant's whole premise on this phase of the matter is derived apparently from certain language used by Judge Cavanah in his memorandum decision. Naturally, in discussing the history of the matter he used the language that the parties had entered into an agreement that additional water rights could be sold. He did not intend to hold, nor did he determine that this was valid, nor would any reasonable man reading his opinion, arrive at the idea that he was upholding the validity upon the procedure. He simply commented that the parties had so proceeded.

Of course the judgment of the Court is that ex-

pressed in the two orders entered (Tr. p 53, 105). There is nothing in either of these orders which could ever be plead as an adjudication on the merits. Counsel for appellant expresses the fear that if the present proceedings be allowed to stand that we would plead Judge Cavanah's orders as a judgment on the merits in the State Court case. Counsel for appellant is too good a lawyer to urge this point with any energy. He would be the first to make proper objection in the event that we attempted any such procedure. In his first memorandum decision (Tr. p 52) the trial court first specifically stated that the ground for his decision was that the Supplemental Bill was not germane to the original action and then went on to state that:

> "If a stockholder feels that his company has jeopardized his rights in entering into the agreement in question, he can avail himself of the remedy provided by law in a proper action, and bring in all the parties to the contract." (Tr. p 52).

In his second memorandum decision (Tr. p 104-105) the trial court expressly adopted the reasons set forth in his first memorandum decision. Therefore, when counsel urges that there was an adjudication on merits, he is going contrary to the express language of the trial court. There was only one question determined in the court below, and that was that these proposed Supplemenal Bills were not entitled to be filed, and the appellant lost nothing except the right to file these bills. After the entry of Judge Cavanah's order, and at the present time, the appellant has all of the rights and remedies affecting this contract that he possessed on the day he tendered the

Supplemental Bill. The decisions and orders of Judge Cavanah in no way deprived him of any remedy or right to proceed that he would otherwise have. There is nothing any place in the record to show that the trial judge, in any way, considered or decided the merits of the controversy, and to isolate that portion of his decision where he commented on the fact that the parties had proceeded along the lines provided in the Dietrich decree, does not change this situation. Counsel has attempted to single out a small portion of the opinion and hang his whole case on it, rather than presenting the opinion as a whole.

CONCLUSION.

We can only summarize what we have said above by again stating that it is very clear that the controversy sought to be presented in the Supplemental Bill is not one that was in any way adjudicated by the Dietrich decree, but is an entirely new, different, and independent one. And this, we believe is entirely determinative of the case.

Even if it were germane, the fact of the pendency of the other action in the State Court; the fact that appellant's acion is on is face barred by the statute of limitations; and the fact that it is an attempt to try a fraud case in a summary proceedings; and the many other reasons why the court was entitled to exercise at his discretion as he did, all show that there was no abuse of discretion. The case clearly comes within the rule announced in one of the cases cited by appellant:

> "Granting or refusing leave to file a supplemental bill is usually in the discretion of the trial court, and where its order refusing such

leave is not an adjudication of the merits, but leaves it open to complainant to obtain such adjudication by a new bill, it will not be reversed by the appellate court."

Rosemary Mfg. Co. v. Halifax Cotton Mills, 266 Fed. 363. (syllabus).

The proposed Supplemental Bill seeks to have a new adjudication upon new facts not determined by the Dietrich decree. The order of the court does not bar another action; another action is actually pending in the State Court upon the same facts; the proper parties are not before the court for a complete determination of the controversy presented, while on the other hand they are present in the State Court case. For all of these reasons the court below was entirely correct and did not abuse its discretion in denying the right to file the Supplemental Bill. It is assuredly not the policy of the law that the appellees herein should be harrassed by being compelled to face the action pending in the State Court and also this attempted reopening of this old and entirely different case more than ten years after the entry of the decree therein.

We respectfully submit that the order of the trial court should be affirmed.

Respectfully submitted,

WALTERS, PARRY and THOMAN,
E. A. Walters,
R. P. Parry,
J. P. Thoman,
Attorneys and Solicitors for
Appellees.

No. 5740

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

D. L. McCLUNG,

Appellant,

vs.

TWIN FALLS NORTH SIDE LAND & WATER COMPANY, a Delaware Corporation, and THE CONTINENTAL AND COMMERCIAL TRUST AND SAVINGS BANK, a Corporation, Trustee,

Appellees.

REPLY BRIEF OF APPELLANT

Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

J. B. ELDRIDGE,
Solicitor for Appellant.

Filed.., 1929.

....Clerk.

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Upon Appeal from the United States District Court, for the District of Idaho, Southern Division.

After a careful examination of appellees' brief we feel that we should point out the many mistakes and errors therein in a very short reply.

Appellees urge that the supplemental bill was not germane to the original bill and argue such at length.

An examination of the amended bill in equity in the original case sent up as an exhibit discloses in

paragraphs 13 and 20 that it was alleged that the project was incomplete and an inadequate water supply provided for.

An examination of the amended and supplemental answer of the Land & Water Company discloses a denial of the allegations in paragraphs 13 and 20 of the amended bill and alleges on page 14 the acceptance by the State of the canal and diversion works and on page 35 alleges ample supply of water for the whole project and works to carry it, which raises the direct issue of whether or not adequate works and water supply had beeen furnished.

An examination of the supplemental bill discloses the violation of the Federal decree in that the project had not been completed as provided for in the decree and that an adequate irrigation works and water supply was not furnished and the prayer asked that the works be completed conforming to the decree and injunctive relief against further sale of water rights. (Pages 66 and 67, Tr.).

The court's attention is invited to the case of Vinyard vs. North Side Canal Company, et al (274 Pac. Advance Sheet No. 5, page 1069), wherein is found a decision by the Supreme Court of the State of Idaho holding and deciding that there is a shortage of 155,000 acre feet in an average year on the second and third segregations of the North Side project alone. A reading of that decision by the highest court of the State of Idaho will disclose the deplor-

able condition from the standpoint of the water supply on the North Side project. This fully supports and sustains McClung, a settler on said project, and the supplemental complainant in this cause, in his charge of bad faith against the state officers and the North Side Canal Company and the Land & Water Company in permitting further sales of Canal Company stock and agreeing that such sales could be made without violating the settlers' contracts, and the Federal decree.

How anything could be more germane to the original action is inconceivable to us. Germane means closely allied, related to, pertaining to.

> City of Chicago v. Reeves, 77 N. E. 237.
>
> State ex. rel., Thompson v. Major, 123 N. W. 429.
>
> Webster's International Dictionary.

Nothing better illustrates the many errors and mistakes in respondents' brief than the following assertion:

> "The Dietrich decree said nothing about the completion of the system. It could not do so for the system was admittedly incomplete." (Apellees' brief, page 19).

Now let us turn to the Dietrich decree and see what it says and in the opening paragraph we find the court decreed:

> "That the construction company shall complete its irrigation system in accordance with

the terms and conditions of its existing contracts with the State of Idaho." (Page 74 Tr.).

Counsel says on page 18 of their brief:

"That to be a proper supplemental bill the the source of the rights of the complainant must be the former decree; that the complainant must be able to say to his adversary here is my decree, your acts are in violation of that and this decree has already been settled in my favor."

That is just our position. Judge Dietrich said:

"This system shall be completed according to the State contract and that no more than 170,000 shares representing a like number of acres can be sold unless it can be done without violating the settlers' contracts. (Page 76 Tr.).

McClung in his supplemental bill says the project was not completed so as to serve more than 163,000 acres and that to sell more shares would be to violate the settlers' contracts. (Page 59 Tr.).

But we are told on page 12 of appellees' brief that the Federal Court provided that the Construction company might bring a suit in any court of competent jurisdiction to determine its right to sell further water rights and that because the court made no such provision for the settlers to bring a suit that they have no remedy (pages 12 and 13, appellees' brief).

This is a strange doctrine that any court could, or would try to deprive a settler or any one else from

asserting an action or right in court because that court made no provision that the person might do so; it is a revolutionary doctrine unheard of in law and yet that is just the position of appellees here.

To further render the brief of appellees untenable it is argued on page 11 that because the Commissioner of Reclamation accepted the system as completed and authorized additional sales that the water user is bound by that fact, though McClung says in his supplemental bill that such action or acceptance and approval was the result of a wrongful and unlawful conspiracy between the Commissioner of Reclamation and the Land & Water Company and the Canal Company, yet it is argued no remedy exists, and McClung further alleges that only recently did he discover any attempt to sell further stock though the contract for the sale had been made for some time.

Another inconsistency appears in appellees' brief at the top of page 13, referring to McClung:

> "He does not allege that the parties have violated the decree—of course if they had the appellant would have his remedy of proceeding against them for contempt of court."

Now turn to the supplemental bill as follows:

> "That the present capacity of the irrigation system furnished by said Land & Water Company for said North Side Canal Company is not sufficient to permit of the delivery of the

amounts already contracted to be delivered to settlers by said Land & Water Company; that the dependable operating capacity of the system is not more than 3360 second feet and there is a water loss of 40 per cent of making deliveries through said system; and that 3360 second feet of water if available in the system will only furnish and deliver the contract amounts of water to 163,080 acres under said State and settlers' contracts now outstanding."

"That the said Twin Falls North Side Land & Water Company, defendant herein, is offering to sell 15,000 shares of stock more representing water for use on 15,000 acres additional lands to be irrigated from the said water supply, and to be irrigated from the canal system belonging to the lands of the North Side project as aforesaid, which are wholly and notoriously inadequate to furnish water, therefor *in that said system has never been completed in conformity with said decree* and that further sale of additional shares of stock and water rights to additional lands as is now proposed and threatened by defendant, Twin Falls North Side Land & Water Company as aforesaid, *and in violation of said decree*, will cause great and irreparable injury to your supplemental complainant and all others similarly situated." Pages 58, 59 and 60 Tr.

ANOTHER ACTION PENDING

The amended bill in equity in the original case was an action for a cancellation of the State contract or for its specific performance as an examination will disclose. The separate amended answer of the Land & Water Company at page 3 alleges that the action is one for specific performance and this is true. When we turn to the prayer of the supplemental bill we find the only relief sought is an injunctive order to restrain further sales and that the project be completed according to the Federal decree without any mention whatever of the fraudulent contract entered into July, 1921, for the sale of further rights. No relief whatever is asked against that contract in this case. The affidavit of E. A. Walters and all the proceedings in the case by McClung in the State court for cancellation of the fraudulent contract for the sale of water rights have no connection with, and are not germane to the original case at all and are brought into this case by the defendants themselves and not by the supplemental complainant McClung, save and except for the purpose of advising the court of the method that was selected by the co-conspirators to avoid and *violate said decree* while pretending to comply with it. Examine the prayer of the State case, interposed as an objection and being urged here as an objection as shown by the exhibits sent up to this court is as follows:

"WHEREFORE, plaintiff prays and demands (a) that this court issue its order to show cause to said defendants and fix a time and place certain when said defendants shall be required to appear before this court and show cause, if any they have, why they, their attorneys and agents, should not be temporarily restrained and enjoined from selling any additional water rights or the rights to the use of water upon said Twin Falls North Side project, and why said defendants should not be restrained and enjoined from selling any of the stock of said North Side Canal Company, Limited, or any additional rights whatsoever in any manner whatsoever upon said North Side project in excess of one hundred seventy thousand acres;

(b) That upon the return and hearing of said order to show cause said defendants be temporarily restrained and enjoined from selling any additional water rights upon said North Side project in excess of one hundred seventy thousand acres, or any additional stock in said North Side Canal Company, Limited;

(c) That upon the final hearing of this cause said defendants be permanently restrained and enjoined from selling any additional water rights for any lands upon said North Side project in excess of one hundred seventy thousand acres, and be permanently restrained and enjoined from selling any additional stock in said North Side Canal Company, Limited;

(d) That said contract bearing date the 27th day of July, 1921, by and between Twin Falls

North Side Land & Water Company and North Side Canal Company, Limited, W. G. Swendsen, Commissioner of the Department of Reclamation of the State of Idaho, and North Side Pumping Company, be surrendered up for cancellation and that said contract, by order of this court be cancelled and held for naught;

(e) That plaintiff have such other and further relief as to the court may seem just and equitable."

Now the prayer of the supplemental bill is as follows:

"Wherefore supplemental complainant prays:

First. That an order of this court be issued permitting supplemental complainant to file his supplemental bill herein.

Second. That defendant, Twin Falls North Side Land & Water Company be restrained and enjoined permanently from the sale of any further water rights to be supplied under said State and settlers' contracts, out of the water supply available at the time said decree was entered and restrained and enjoined from the sale of any further water or water rights to be carried through said canal as now constructed.

Third. That Twin Falls North Side Land & Water Company be required to complete said irrigation system in conformity with said contracts.

Fourth. That if the court shall find it expedient and necessary, that the court appoint a party to take charge of said irrigation works

and complete the same at the expense of said Twin Falls North Side Land & Water Company, so as to make possible the delivery of the contracted amounts of water for 170,000 acres to the end that the settlers' contracts shall not be violated.

(Here Equity Rule 8 is invoked).

Fifth. That if it be deemed necessary for the bringing in of North Side Canal Company, Limited, a corporation, then an order to that effect be entered and said North Side Canal Company, Limited, be made a party defendant herein and that an order for process and service be issued accordingly.

Sixth. That your supplemental complainant and those similarly situated have such other and further relief as to the court may appear just in the premises. (Pages 67 and 66, Tr.).

An examination of the case shows not only that the issues are different but that the parties are entirely different, hence the case does not fall within the rule as follows:

> "If you should set up in abatement a suit pending, the plea should show, first, same parties; second, same cause of action; third, whether the case is pending in law or equity; fourth, the same relief sought; fifth, the state of the pleadings in the other court. If not strictly within these rules, the plea should be overruled."
>
> Griswold v. Bacheller, 77 Fed. 857.

Green v. Underwood, 30 C. C. A. 162, 57 U. S. App. 535, 86 Fed. 429.

Simpkins Federal Practice, page 679."

Thus we see that the State action should not be permitted to be set up in opposition to filing the supplemental bill.

It has been suggested that the State of Idaho is a necessary party because in the first instance before the water is appropriated the States own the water. This argument is without any merit whatsoever and will be apparent to the court from a mere reference to it.

It is also argued that relief cannot be granted McClung because Judge Dietrich did not retain jurisdiction. This is another novelty.

STATUTE OF LIMITATIONS

It is urged that the statute of limitations of the State has run against the right of McClung to ask for the enforcement of a decree.

An action under a supplemental bill is not an action on a judgment as contemplated by the statutes of limitation and they have no application.

Bashor v. Beloit, 20 Ida. 592.

Green v. Houser, 9 M. Y. S. 660.

The proceeding is just a continuation of the old case.

Simpkins Federal Practice, Revised Edition, p. 635 and numerous cases therein cited.

The logical sequence of such an argument is that no one could receive the benefits of a decree rendered in his favor or enforce it by supplemental bill or otherwise if the court rendering the decree did not retain some sort of jurisdiction for further action in the premises.

It was shown in the opening brief that a court never loses jurisdiction to enforce its decree.

ADJUDICATION ON THE MERITS

We contend that the court did adjudicate the application to file the supplemental bill on the merits for in speaking of the right to sell 185,000 acres the court said:

> "The right was there given to the defendant company to sell and keep sold 185,000 shares of the capital stock of the Canal Company. So the provisions of the decree of the original action in that respect was complied with when the parties interested agreed to allow the company to sell and dispose of the 15,000 shares of the stock in addition to the stock then sold and outstanding." (Page 46 Tr.).

Again the lower court said:

> "By entering into this agreement they took the steps prescribed in the decree and thereby removed the necessity of bringing an action in this court to determine the question involved here." (Page 48 Tr.).

This is a complete determination for the lower

court decided from what had been done there was no necessity of filing the supplemental bill.

Again the trial court said:

> "There is no dispute as to the execution of the agreement referred to. It would seem that at the present time there is no question under the decree to be adjudicated as the parties have agreed in the manner directed in the decree." (Page 49 Tr.).

Again on the same page the court said:

> "North Side Canal Company representing its stockholders among whom was the Supplemental Complainant McClung and his predecessor in interest *complied with the decree* by entering into the agreement allowing the defendant company to sell the additional 15,000 shares of stock in question and asserted therein that there was a sufficient water supply and that the canal system was adequate to divert it."

Can it be said that the court did not determine those matters on the merits? McClung never agreed to further sales. Page 65 Tr. par. XXI.

Quoting from the court further beginning at the bottom of page 49 Tr., we find:

> "The further request in the proposed bill that the defendant company be required to complete the irrigation system is answered by the provisions in the decree and the agreement of the parties entered into in July, 1921."

We find the lower court saying point blank that the decree of Judge Dietrich has been complied with

and not violated. The following discussion by the court on the merits of the agreement of July, 1921, as a reason why the court did not permit the filing of the supplemental bill which said agreement in the second supplemental bill was alleged by McClung to be fraudulent and executed as a result of a conspiracy for the sole purpose of avoiding the decree of Judge Dietrich while pretending to comply with it, and yet in the face of that contention set forth in the supplemental bill, the trial court decided that this agreement made in fraud was a compliance with the decree of Judge Dietrich, and for that reason the supplemental bill should not be allowed to be filed.

Again the court quotes at length from the fraudulent agreement of July, 1921, as follows:

> "Whereas said work of canal enlargement and improvement has been completed including an increasing right in the Milner Diversion Dam by means of which about 500 second feet of additional water can now be diverted into said canal system and whereas it has been determined and ascertained by the parties hereto and so agreed that said irrigation system and the present water supply therefor can without violating the terms or provisions of the settlers' contracts irrigate 185,000 acres of land."

Then as a further quotation from the contract the court said:

"This requirement of the decree was recognized and admitted by the parties as we find in the clause quoted from the agreement." (Pages 50 and 51 Tr.).

"It further appears that the system was on August 6, 1920, accepted as completed according to the contract by the State and for and on behalf of the North Side Canal Co." (Page 52 Tr.).

Again the lower court indulged an absolute finding upon the merits as a further reason why the supplemental bill should not be allowed to be filed, although it was alleged by McClung that the acceptance and the agreement was the result of a fraud upon him and those similarly situated by Commissioner Swendsen and the Land & Water Company and the North Side Canal Company.

Then finally the court said that the controversy between McClung, a stockholder of the North Side Canal Company, the defendant company and the State, was not germane to the original bill or decree.

Here is where we think the lower court took the wrong view and clearly erred for in the second supplemental bill it was clearly set out that the fraudulent acts of the Commissioner of the Reclamation and the Land & Water Company and the Canal Company were the result of a scheme to violate the original decree of the Federal Court and necessarily related to it, and was the very means whereby the original decree of the Federal Court was rendered

nugatory and ineffective and used that method to thwart the judgment of the court and deprive McClung of the benefits to be derived from that decree. McClung plead these facts for the purpose of showing the scheme and the methods just how and the manner in which the decree of the Federal Court was violated to his injury.

These are the reasons why the trial court erred in adopting its former decision so fully quoted from, as a reason for denying the second motion to file a supplemental bill. For the trial court to accept a contract made as a result of an unlawful conspiracy to violate a decree of court as a reason why a supplemental bill should not be allowed to be filed while that bill charges such contract as sounding in fraud, bad faith and unlawful conduct seems to us to be an abuse of discretion and we urge that the cause be sent back with instructions to the trial court to permit McClung to file his supplemental bill and hear the matter on its merits.

Respectfully submitted,

J. B. ELDRIDGE,

Solicitor for Appellant.

No. 5741

13

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,
vs.
SOUTHERN PACIFIC COMPANY,
Appellee.

Transcript of Record

Appeal From the United States District Court for the Southern District of California, Northern Division.

FILED
FEB 27 1929
PAUL P. O'BRIEN,
CLERK

Los Angeles Review Law Printers 224 Court Street, Los Angeles, Calif.

No........................

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Appellee.

Transcript of Record

Appeal From the United States District Court for the Southern District of California, Northern Division.

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(Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.)

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

SAMUEL W. McNABB,
United States Attorney,

HARRY GRAHAM BALTER,
Assistant United States Attorney,

Federal Building,
Los Angeles, California.

For Appellee:

L. L. CORY,
Cory Building,
Fresno, California.

CITATION

No. 409-H

UNITED STATES OF AMERICA—ss.

To Southern Pacific Company—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 1st day of March. A. D. 1929, pursuant to and order allowing appeal filed in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause where you are defendant in error and the United States of America is plaintiff in error, and you are hereby required to show cause, if any there be, why the judgment rendered in the said order allowing appeal mentioned. should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable United States District Judge for the Southern District of California, this 4th day of February, A.D. 1929, and of the Independence of the United States, the one hundred and fifty-third.

EDWARD J. HENNING,
U. S. District Judge for the Southern District of California.

Service of the foregoing citation admitted by copy this 6th day of February, 1929. L. L. Cory, Attorney for Defendant.

(Endorsed): Filed Feb. 11, 1929. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.
SOUTHERN PACIFIC COMPANY,
Defendant.

No. 409-H

COMPLAINT.

Now comes the United States of America, by Samuel W. McNabb, United States Attorney and Ignatius F. Parker, Assistant United States Attorney, for the Southern District of California and brings this action on behalf of the United States against the Southern Pacific Company, a corporation, organized and doing business under the laws of the State of Kentucky, and having an office and place of business at Merced, in the State of California; this action being brought upon suggestion of the Attorney General of the United States at the request of the Interstate Commerce Commission, and upon information furnished by said Commission.

FOR A CAUSE OF ACTION

plaintiff alleges that defendant is, and was during all the times mentioned herein, a common carrier engaged in interstate commerce by railroad in the State of California.

Plaintiff further alleges that in violation of the Act of Congress known as the Safety Appliance Act, approved March 2, 1893 (contained in 27 Statutes at Large, page 531), as amended by an Act approved April 1, 1896 (contained in 29 Statutes at Large, page 85), and as amended by an Act approved March 2, 1903, (contained in 32 Statutes at Large, page 943), defendant, on April 18, 1928, hauled on its line of railroad, over a part of a highway of interstate commerce, one car, to wit: W. P. box No. 15107.

Plaintiff further alleges that on said date defendant hauled said car as aforesaid over its line of railroad from Merced, in the State of California, toward Tracy, in said State, within the jurisdiction of this court, when the coupling and uncoupling apparatus on the "A" end of said car was out of repair and inoperative, the uncoupling lever keeper on said end of said car being incorrectly applied, thus necessitating a man or men going between the ends of the cars to couple or uncouple them, and when said car was not equipped with couplers coupling automatically by impact, and which could be uncoupled without the necessity of a man or men going between the ends of the cars, as required by Section 2 of the Safety Appliance Act, as amended by Section 1 of the Act of March 2, 1903.

Plaintiff further alleges that by reason of the violation of the said Act of Congress, as amended, defendant is liable to plaintiff in the sum of one hundred dollars.

WHEREFORE, plaintiff prays judgment against said de-

fendant in the sum of One Hundred dollars and its costs herein expended.

SAMUEL W. MCNABB,
Samuel W. McNabb,
United States Attorney.
IGNATIUS F. PARKER,
Ignatius F. Parker,
Assistant United States Attorney.

(Endorsed): Filed Jun 2, 1928. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 409-H.

ANSWER

Comes now the defendant above named and for its answer to plaintiff's complaint on file herein, admits, denies and alleges as follows, to-wit:

I.

This answering defendant denies each and every allegation contained in plaintiff's complaint wherein it is alleged that this defendant violated the provisions of the Safety Appliance Act with respect to W. P. Box car No. 15107, and specifically denies each and every allegation with respect thereto.

WHEREFORE, this answering defendant prays that plaintiff take nothing by reason of its action, and that it be discharged with its costs.

W. I. GILBERT,
W. I. Gilbert,
Attorney for Defendant.

(Duly verified):

(Endorsed): Filed Jun 25 1928. R. S. Zimmerman, Clerk. By L. J. Cordes, Deputy Clerk.

[Title of Court and Cause.]

No. 409-H

NOTICE OF SUBSTITUTION OF ATTORNEYS.

To the Plaintiff above named, and to Samuel W. McNabb, U. S. Attorney, and Ignatius F. Parker, Assistant U. S. Attorney:

You will please take notice that we have hereby substituted L. L. CORY, Esquire, in the place and stead of W. I. GILBERT, Esquire, as our attorney in the above entitled action.

Dated: November 5th, 1928.

SOUTHERN PACIFIC COMPANY,
By Guy V. Shoup
General Solicitor.

I hereby agree to said substitution.

Dated: October 31, 1928.

W. I. Gilbert
W. I. Gilbert

I hereby accept said substitution.

Dated: November 10th, 1928.

L. L. Cory.

(Endorsed): Filed Nov 12 1928. R. S. Zimmerman, Clerk. By M. L. Gaines, Deputy Clerk.

[Title of Court and Cause.]

No. 409-H

FINDINGS OF FACT
and
CONCLUSIONS OF LAW

This cause coming on for trial before the Court at Fresno, at the November, 1928, term, to-wit: on the 26th day of November, 1928, evidence being introduced by the respective parties, and arguments heard thereon, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT.

On April 18, 1928, defendant, a common carrier engaged in interstate commerce, operated on its line of railroad from Merced, California, toward Lathrop, California, over a highway of interstate commerce, its certain freight train known as Extra West 1722, containing 40 or more cars, one of which was Western Pacific Box Car 15107.

At the time said car was moved out of Merced, and for a little over an hour prior thereto, the coupling and uncoupling apparatus on its "A" end was out of repair and inoperative in the manner alleged in plaintiff's complaint.

CONCLUSION OF LAW.

Defendant violated the Safety Appliance Act in so hauling said defective car out of Merced, California, for which action it is liable to plaintiff for the statutory

penalty of $100.00, and judgment shall be entered accordingly.

EDWARD J. HENNING,
United States District Judge.

Fresno, California
November 27, 1928.

(Endorsed): Filed Nov 28 1928. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 409-H

JUDGMENT

This cause coming on for trial before the Court at Fresno, at the November, 1928, term, to-wit: on the 26th day of November, 1928, the parties hereto, by their written stipulation duly filed having waived trial by jury, the plaintiff being represented by Samuel W. McNabb, United States Attorney, Harry Graham Balter, Assistant United States Attorney, for the Southern District of California, and M. C. List, Special Assistant to the United States Attorney, the defendant being represented by L. L. Cory, evidence having been introduced by plaintiff and defendant, arguments having been heard in support of motions for judgment in favor of the respective parties, and the Court, after consideration thereof, having found the issues in favor of plaintiff and against the defendant:

IT IS ORDERED that judgment shall be and the same is hereby entered in favor of plaintiff and against defendant

in the sum of $100.00, together with costs amounting to $17.00, a total of $117.00.

IT IS FURTHER ORDERED that the judgment herein entered for the statutory penalty of $100.00 may be and hereby is suspended, and that said judgment for said $100.00 shall be entered by the Clerk as satisfied upon the payment of the aforesaid costs:

IT IS FURTHER ORDERED that the plaintiff may be allowed an exception to the action of the Court in so suspending said judgment as to $100.00 and in ordering it satisfied upon the payment of said costs.

EDWARD J. HENNING,
United States District Judge.

Fresno, California.
November 27, 1928.

Judgment entered November 28th, 1928. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

(Endorsed): Filed Nov 27 1928. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk

Dock and Ent. 11/28/28 indexed same date.

[TITLE OF COURT AND CAUSE.]

No. 409-H

ASSIGNMENT OF ERRORS.

NOW comes the plaintiff by Samuel W. McNabb, United States Attorney for the Southern District of California, and Harry Graham Balter, Assistant United States Attorney for the said district, and in connection with its Petition for Appeal says that in the record,

proceedings and in the final judgment in the above entitled action manifest error has intervened to the prejudice of the plaintiff, to-wit:

I.

That the judgment as entered herein in this action is contrary to law and erroneous in that it provides that the payment of the statutory penalty of $100.00 entered in the same judgment in favor of the plaintiff and against the defendant was erroneously suspended.

II.

That the court erred in providing that the judgment in favor of the plaintiff for said $100.00 shall be entered by the clerk as satisfied upon payment of the costs.

III.

That the said judgment is inconsistent within itself and is contrary to law, by reason whereof plaintiff prays that the judgment herein be corrected to the extent that that portion thereof suspending payment of the statutory penalty of $100.00 and ordering that the same be satisfied upon payment of costs be stricken therefrom.

Dated this 20 day of December, 1928.

SAMUEL W. McNABB,
United States Attorney.

HARRY GRAHAM BALTER,
Harry Graham Balter,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

I hereby certify that the foregoing Assignment of Errors is made in behalf of the plaintiff hereinabove named, for an appeal and is in my opinion, and the same

now constitutes the Assignment of Errors upon the appeal prayed for.

HARRY GRAHAM BALTER,
Harry Graham Balter,
Assistant U. S. Attorney.

(Endorsed): Filed Dec 20 1928. R. S. Zimmerman, Clerk. By Edmund L. Emith, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 409-H

PETITION FOR APPEAL.

To the Honorable Edward J. Henning, Judge of the Above Entitled Court:

NOW COMES the plaintiff, United States of America, by Samuel W. McNabb, United States Attorney for the Southern District of California, and Harry Graham Balter, Assistant United States Attorney for the said District, and feeling itself aggrieved by the final judgment entered in this cause hereby prays that an Appeal may be allowed, to-wit: from the United States District Court for the Southern District of California to the United States Circuit Court of Appeals for the Ninth Circuit, and in connection with this petition, Petitioner hereby presents its Assignment of Errors.

SAMUEL W. McNABB,
United States Attorney.
HARRY GRAHAM BALTER,
Harry Graham Balter,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

(Endorsed): Filed Dec 20 1928. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

No. 409-H

ORDER FOR APPEAL.

IT IS HEREBY ORDERED that the Appeal prayed for in the Petition for Appeal in the above entitled case be allowed.

EDWARD J. HENNING,
United States District Judge for the Southern District of California.

(Endorsed): Filed Dec 20 1928. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

[Title of Court and Cause.]

No. 409-H

STIPULATION.

IT IS STIPULATED by and between the respective counsel in the above entitled action that in the printing of the Transcript on Appeal herein the title of the court and the title of the cause and the captions on the pleadings and documents, may be indicated thus (title of Court and Cause), and need not be printed in full, and that

the endorsements on such papers and documents except the filing endorsements, may also be omitted.

SAMUEL W. MCNABB,
United States Attorney.
HARRY GRAHAM BALTER,
Harry Graham Balter,
Assistant United States Atty.,
Attorneys for Plaintiff.
L. L. CORY,
L. L. Cory,
Attorney for Defendant.

APPROVED this 12th day of February, 1928.

EDWARD J. HENNING,
Judge for the Southern District of California.

(Endorsed): Filed Feb 12 1929. R. S. Zimmerman, Clerk. By Francis E. Cross, Deputy Clerk.

[TITLE OF COURT AND CAUSE.]

No. 409-H

PRAECIPE.

To the Clerk of Said Court.

Sir:

Please prepare and certify copy of such papers filed and proceedings had in the above entitled action as are necessary to a determination of the cause on appeal and in particular as follows:

1. Complaint.
2. Answer to Complaint.
3. Notice of Substitution of Attorneys.
4. Findings of Fact and Conclusions of Law.

5. Judgment.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignment of Errors.
9. Citation on Appeal.
10. Stipulation and Order.
11. And this Praecipe.

SAMUEL W. McNABB,
United States Attorney.
HARRY GRAHAM BALTER,
Harry Graham Balter,
Assistant United States Attorney,

(Endorsed): Received copy of within PRAECIPE this 6th day of February 1929. L. L. Cory, Attorney for Defendant. Filed Feb 11 1929. R. S. Zimmerman, Clerk. By Edmund L. Smith, Deputy Clerk.

CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 16 pages, numbered from 1 to 16 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by Appellant and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of:

1. Complaint.
2. Answer to Complaint.
3. Notice of Substitution of Attorneys.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Petition for Appeal.
7. Order Allowing Appeal.
8. Assignment of Errors.
9. Citation on Appeal.
10. Stipulation and Order for Diminution of Record, and
11. Praecipe.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this..................day of February, in the year of our Lord one thousand nine hundred

twenty-nine, and of our Independence the one hundred fifty-third.

(SEAL) R. S. ZIMMERMAN,

Clerk of the District Court of the United States of America, in and for the Southern District of California.

By..Deputy Clerk.

14

No. 5741

In the United States Circuit Court of Appeals for the Ninth Circuit

THE UNITED STATES OF AMERICA, APPELLANT

v.

SOUTHERN PACIFIC COMPANY, APPELLEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF AND ARGUMENT FOR APPELLANT

SAMUEL W. McNABB,
United States Attorney.
HARRY GRAHAM BALTER,
Assistant United States Attorney.
MONROE C. LIST,
Special Assistant to the United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE : 1929

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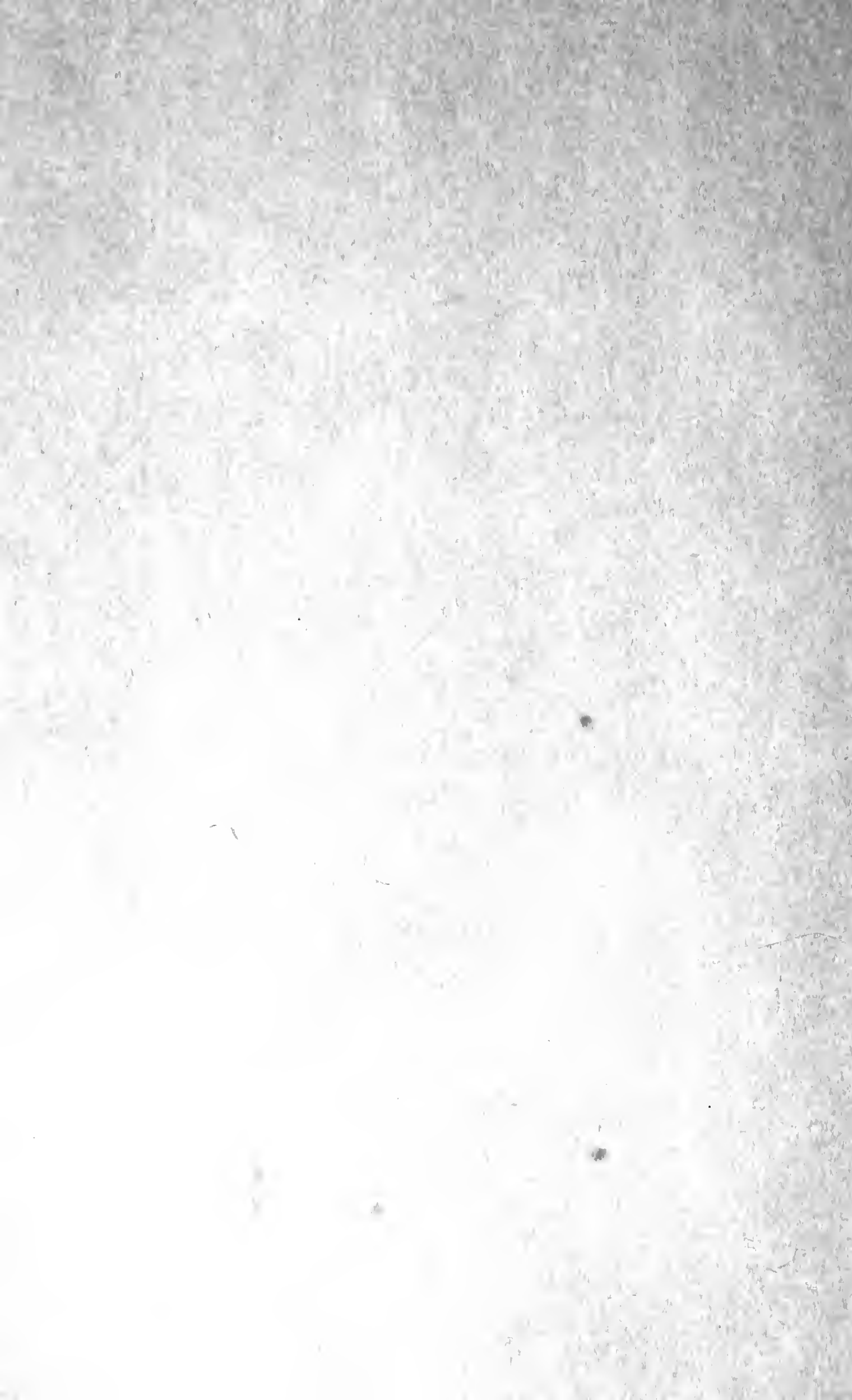

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5741

The United States of America, appellant

v.

Southern Pacific Company, appellee

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF AND ARGUMENT FOR APPELLANT

STATEMENT OF FACTS

This case arises out of a violation of Section 2 of the Federal Safety Appliance Act, prohibiting the use of cars with defective couplers, and involves the right of the trial Court, upon finding the carrier guilty, a jury having been waived (Rec. 8) to suspend judgment for the statutory penalty and in directing the Clerk of the Court to show such judgment as satisfied upon payment of the costs.

The complaint alleges that on April 18, 1928, appellee (hereafter called the defendant or carrier) hauled on its line from Merced, California, a certain

freight car, known and designated as Western Pacific box car No. 15107, and that when so hauled the coupling and uncoupling apparatus on the "A" end was so defective as to require the presence of a man or men between the ends of the cars to couple or uncouple them. (Rec. 3.)

Defendant's answer sets up no justification, nor did it attempt to bring itself within the Proviso; it simply denied "each and every allegation contained in plaintiff's complaint wherein it is alleged that this defendant violated the provisions of the Safety Appliance Act with respect to W. P. box car No. 15107, and specifically denies each and every allegation with respect thereto." (Rec. 5.)

The issues were found in favor of the Government, the Court making the following findings (Rec. 7):

Findings of Fact

> On April 18, 1928, defendant, a common carrier engaged in interstate commerce, operated on its line of railroad from Merced, California, toward Lathrop, California, over a highway of interstate commerce, its certain freight train known as Extra West 1722, containing 40 or more cars, one of which was Western Pacific Box Car 15107.
>
> At the time said car was moved out of Merced, and for a little over an hour prior thereto, the coupling and uncoupling apparatus on its "A" end was out of repair and inoperative in the manner alleged in plaintiff's complaint.

Conclusion of Law

> Defendant violated the Safety Appliance Act in so hauling said defective car out of Merced, California, for which action it is liable to plaintiff for the statutory penalty of $100.00, and judgment shall be entered accordingly.

Thereupon, the trial Court entered judgment in favor of the Government and against the defendant for the statutory penalty of $100.00 and costs. At the same time the Court, for reasons not disclosed by the Record, decided to relieve the defendant of liability for the statutory penalty, which it did in the following manner, the same being part of the Judgment (Rec. 9):

> It is Further Ordered that the judgment herein entered for the statutory penalty of $100.00 may be and hereby is suspended, and that said judgment for said $100.00 shall be entered by the Clerk as satisfied upon the payment of the aforesaid costs.

Proper exceptions were taken to such action of the Court, as disclosed by the last paragraph of the Judgment:

> It is Further Ordered that the plaintiff may be allowed an exception to the action of the Court in so suspending said judgment as to $100.00 and in ordering it satisfied upon the payment of said costs.

which exceptions are the basis of the Government's Assignment of Errors (Rec. 9):

ASSIGNMENT OF ERRORS

1. That the judgment as entered herein in this action is contrary to law and erroneous in that it provides that the payment of the statutory penalty of $100.00 entered in the same judgment in favor of the plaintiff and against the defendant was erroneously suspended.

2. That the Court erred in providing that the judgment in favor of the plaintiff for said $100.00 shall be entered by the clerk as satisfied upon payment of the costs.

3. That the said judgment is inconsistent within itself and is contrary to law, by reason whereof plaintiff prays that the judgment herein be corrected to the extent that that portion thereof suspending payment of the statutory penalty of $100.00 and ordering that the same be satisfied upon payment of costs be stricken therefrom.

QUESTION INVOLVED

In an action for the statutory penalty incurred for violation of the Safety Appliance Act, may the Court, after trial and findings and entry of judgment for the Government, suspend payment of such penalty or order the Clerk to show such judgment as satisfied upon payment of costs?

SAFETY APPLIANCE ACTS

Section 2 of the Act of March 2, 1893 (27 Stat. L., 531), reads as follows:

> That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to

> haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

The Act of March 2, 1903 (32 Stat. L. 943; Sec. 2, Title 45, U. S. Code), extended the provisions of the original Acts to apply to all cars used on the line of a railroad engaged in interstate commerce. Such amendatory Act was held constitutional by the Supreme Court. (*Southern Ry.* v. *United States,* 222 U. S. 20.)

Section 6 of the Act, as amended April 1, 1896 (29 Stat. L., 85; Sec. 6, Title 45, U. S. Code), provides "that any such common carrier * * * hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this Act, *shall be liable to a penalty of one hundred dollars for each and every such* violation. * * *"

ARGUMENT

The purpose of the Safety Appliance Acts is to "promote the safety of employees and travelers." The Supreme Court of the United States, as well as various Courts of Appeal and District Courts, have so often called attention to this essential purpose of the Acts that it is unnecessary to quote from the several opinions of these Courts. They are all very well summarized in the opinion of the Court in the

case of *United States* v. *Southern Railway Company*, 135 Fed. 122:

> The Act is so highly meritorious, so generous in its purposes, so in harmony with the best sentiment of a humane people and a progressive government that it appeals strongly to the courts for its prompt and vigorous enforcement.

It was clearly the intention of Congress that the Acts be vigorously enforced and not left to the discretion of any administrative or judicial officer as to what violations, if any, should be overlooked or condoned. With this thought in mind, Congress expressly provided (Sec. 6) that—

> * * * it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred;

and further:

> * * * it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may come to its knowledge.

Thus, when the Act of April 14, 1910 (36 Stat. L., 298; Secs. 11–16, Title 45, U. S. Code), was passed, Congress reiterated its determination to see that no violation of the Acts was condoned, and so provided (Sec. 5) that "nothing in this Act shall be held or construed to relieve any common carrier, the Interstate Commerce Commission, or any

United States attorney from any of the provisions, powers, duties, liabilities, or requirements" of the former Acts.

Nowhere in the Acts is any authority given the Courts to do other than help rigidly enforce the provisions thereof, and thus carry out the full and manifest intent of the law. So, with this thought before it, the Supreme Court has repeatedly held that the law is not satisfied by even a high or the highest degree of care in a carrier's inspection of cars, but that its requirements are absolute. See:

St. L. I. M. & S. v. *Taylor,* 210 U. S. 281.
Chicago, B. & Q. v. *U. S.,* 220 U. S. 559.

Speaking of the arguments advanced by the carrier in the Taylor case as to the harshness of a rigid enforcement of the Acts, the Supreme Court said (p. 295):

> It is said that liability under the statute, as thus construed, imposes so great a hardship upon the railroads that it ought not to be supposed that Congress intended it. * * * But this argument is a dangerous one, and should never be heeded where the hardship would be occasional and exceptional.

Later, when this same argument was advanced in the *C. B. & Q. case* (*supra*), the Supreme Court again rejected it as not "open to further discussion here." To which it added that (p. 577) "*if the Court was wrong in the Taylor case the way is open for such an amendment of the statute as Con-*

gress may, in its discretion, deem proper." (Our italics.)

Looking at this argument of harshness from another angle—the lightness of the prescribed penalty—the Circuit Court of Appeals for the Eighth Circuit (*United States* v. *Southern Pacific Company,* 169 Fed. 407, 409) said:

> Conformity to the requirements of the law, as so interpreted, it must be admitted, will often be inconvenient and sometimes impracticable; but Congress had before it for consideration the important question of promoting the safety of employees and travelers upon railroads, and in the accomplishment of its purpose it may well be that the legislative mind considered the inconvenience and impracticability of a literal compliance at times with the law, *and the consequent infliction of the light penalties imposed for its violation to be of little moment compared with the greater importance of protecting life, limb and property. Drastic measures are frequently necessary to protect and safeguard the rights and interests of the people.* (Our italics.)

In no case decided before the 1910 Amendment, did any Court suggest that it had a right to relieve any carrier from a strict compliance with the law, even if harsh, by remitting or suspending payment of the statutory penalty. On the other hand, whatever relief could be had, said the Supreme Court, must come through Congress.

Therefore, with the view of securing relief from what the carriers termed a harsh construction, they appealed to Congress, with the result that the Act of April 14, 1910, was enacted, but even this did not, in any manner, empower a Court to suspend *incurred* penalties. All that it did was (see Sec. 4) to relieve a carrier from incurring the statutory penalty for the movement of a defective car under certain prescribed conditions, embodied in what is known as a Proviso, which Proviso is not involved in the instant case. In connection therewith, part of the Report of the Senate Committee (No. 250, Feb. 18, 1910, to accompany H. R. 5702) will be of interest:

> Prior to the passage and going into effect of the existing safety appliance laws, the largest number of casualties to trainmen from any one cause was occasioned by coupling accidents. At that time such accidents furnished more than 44 per cent of the total number of accidents to trainmen. In the year 1893, with 179,636 trainmen employed, 20,444 were killed or injured. Of this number 9,063 suffered from coupling casualties. In 1908, with 281,645 trainmen employed, the total casualties had increased to 38,165, while it is gratifying to state that the coupling casualties had been reduced to 3,385, but 8.8 per cent of the total.
>
> These figures furnish a striking example of the benefit of this act, *brought about by its passage and rigid enforcement* * * * (Our italics.)

> The amendment proposed permitting movement without penalty of a defective car to a repair shop, when necessary, is deemed advisable, as the Supreme Court of the United States, in the Taylor case, held that the present act, which this act amends and supplements, is absolute, and there is therefore grave doubt as to the right of a railroad company to move even a defective car to a point of repair without incurring the penalties of the act.

Thus, it will be seen that the only relief granted by Congress was to permit, within certain limitations, the movement of a defective car without *incurring* the penalty therefor. There was no suggestion made to Congress, nor any intimation made by it, that Courts be given the power to suspend the payment of penalties *incurred.* Nor has any Court, subsequent to the passage of the 1910 Act, except in the instant case, assumed that it had authority to nullify the penalty provision of the Act.

The right to suspend sentence in a criminal case, the result of a practice existing in the Federal Courts for many years, was finally questioned by the Government and considered by the Supreme Court in the case of *Ex Parte United States,* 242 U. S. 27. In this case, the defendant, having pleaded guilty to an indictment for embezzlement, requested the Court to suspend the five-year penalty imposed by the Act. Over the objection of the Government, District Judge Killits suspended sentence, and the question of his right to do so is

very fully discussed by the Supreme Court. Without quoting at large therefrom, the following taken from the Syllabus (p. 28) clearly sustains the contention of the Government in the instant case:

> But the courts, albeit under the Constitution they are possessed inherently of a judicial, discretionary authority which is ample for the wise performance of their duties in the trying of offenses and imposing of penalties as the laws provide, *have no inherent constitutional power to mitigate or avert those penalties by refusing to inflict them in individual cases.*

The Supreme Court went on to point out, that while at common law the courts exercised some discretion to temporarily suspend sentence, they possessed no authority to permanently suspend a sentence, nor did they claim any such authority. And what is there said about this authority in criminal cases applies with stronger force to penal actions of a civil nature.

It would therefore logically follow that neither in criminal nor civil cases have courts any authority to suspend sentences or the payment of penalties, unless so authorized by the Constitution or Acts of Congress.

Following the decisions of the Supreme Court in the case of Judge Killits (*supra*), and the *Taylor case* (*supra*), the aid of Congress was invoked to relieve the situation, and it did so. In criminal cases it gave the courts authority to suspend sen-

tences (Probation Act, Sec. 724, Title 18, U. S. Code), while in Safety Appliance cases, it relieved carriers from incurring penalties under certain conditions not involved in the instant case, but conferred no right whatever upon courts to suspend payment of penalties actually *incurred.*

If the judgment of suspension and so termed "satisfaction" of the penalty in the instant case is allowed to stand, and such practice approved by an affirmance thereof by this Court, it will seriously embarrass and cripple the Government in the administration of not only the Safety Apliance Law but other laws similar in character—the Hours of Service Law, the Locomotive Boiler Inspection Law, the 28 Hour Law, and the like, all laws designed for humanitarian ends.

CONCLUSION

Wherefore it is respectfully submitted that the lower Court was without authority either to suspend payment of the statutory penalty or to order the judgment for same shown as satisfied upon payment of the costs. The judgment of the said Court should therefore be modified accordingly.

Samuel W. McNabb,
United States Attorney.
Harry Graham Balter,
Assistant United States Attorney.
Monroe C. List,
Special Assistant to the United States Attorney.

O

No. 5742

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA.

FILED
MAR - 3 1929
PAUL P. O'BRIEN,
CLERK

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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W. N. WAUGH, Esq., of Butte, Montana,
JOHN A. SHELTON, Esq., of Butte, Montana,
Attorneys for Appellant and Defendant.

WELLINGTON D. RANKIN, Esq., U. S. District Attorney of Helena, Montana,
Attorney for Appellee and Plaintiff.

In the District Court of the United States in and for the District of Montana.

No. 2071.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAUL FALL,
Defendant.

BE IT REMEMBERED, that on the 26th day of November, 1928, an information was filed herein, which information is in the words and figures as follows, to wit: [1*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

District Court of the United States, District of Montana, Butte Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PAUL FALL,

Defendant.

INFORMATION.

BE IT REMEMBERED, that L. V. Ketter, Assistant United States Attorney for the District of Montana, on behalf of the United States, comes into the District Court of the United States for the District of Montana, and informs the Court on this —— day of November, 1928:

FIRST COUNT (SALE).

That on or about the 22d day of September 1928, one Paul Fall, whose true name is to the informant *unknow,* at *and* that certain ranch occupied by the defendant located about five miles west from the town of Silver Bow in the county of Silver Bow, in the State and District of Montana, and within the jurisdiction of this Court did *and* then and there wrongfully and unlawfully sell intoxicating liquor, to wit, whiskey, the exact quantity and character of which are to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

SECOND COUNT (MANUFACTURE).

And the informant aforesaid further gives the Court to *understand be* informed:

That on or about the 25th day of October, 1928, one Paul Fall, whose true name is to the informant unknown, at and upon those certain premises described in Count One hereof, did then and there wrongfully and unlawfully manufacture intoxicating [2] liquor, to wit, whiskey, the exact quantity and character of which are to the informant unknown, without then and there first obtaining a permit from the Commissioner of Internal Revenue so to do; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the United States of America.

THIRD COUNT (POSSESSION PROPERTY).

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 25th day or October, 1928, one Paul Fall, whose true name is to the informant unknown, at and within those certain premises described in count One hereof, did then and there wrongfully and unlawfully have and possess property designed for the manufacture of intoxicating liquor, intended for use in violation of Title II of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FOURTH COUNT (POSSESSION LIQUOR).

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 25th day of October, 1928, one Paul Fall, whose true name is to the informant unknown, at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully have and possess intoxicating liquor, to wit, whiskey, the exact quantity and character of which are to the informant unknown, intended for use in violation of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

FIFTH COUNT (NUISANCE).

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 25th day of October, 1928, one Paul Fall, whose true name is to the informant unknown, at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully maintain a common nuisance, that is to [3] say, a place where intoxicating liquor was sold, manufactured, possessed and kept in violation of Title II of the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

(Signed) L. V. KETTER,

Assistant United States Attorney for the District of Montana.

L. V. Ketter, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified, and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he has read the said information and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

(Signed) L. V. KETTER.

Subscribed and sworn to before me this 26th day of November, 1928.

(Signed) C. R. GARLOW,
Clerk, U. S. District Court, District of Montana.

Filed Nov. 26, 1928. [4]

THEREAFTER, on November 26th, 1928, judgment was duly entered herein, in the words and figures as follows, to wit: [5]

United States District Court, District of Montana.

No. 2071.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PAUL FALL,
Defendant.

JUDGMENT.

Defendant present with his attorney, W. N. Waugh, Esq., and the District Attorney appearing for the United States.

Thereupon defendant waived the reading of the information and entered a plea of not guilty. Thereupon, by agreement of respective parties, trial by jury was waived and the cause was tried to the Court without a jury. Thereupon defendant presented his motion to suppress evidence, etc.

Thereupon F. S. Chase, J. J. Maloney and Ben Holter were sworn and examined as witnesses for the United States, whereupon plaintiff rested.

Thereupon L. M. Van Etten, Paul Fall and Mrs. Paul Fall were sworn and examined as witnesses for defendant, whereupon defendant rested.

Thereupon J. J. Maloney was recalled in rebuttal, whereupon the evidence closed and the cause was submitted to the Court.

Thereupon, after due consideration, Court ORDERED that the defendant's motion to quash the search-warrant and suppress the evidence herein be denied.

Thereupon, after due consideration, Court finds the defendant guilty as charged in the information herein and ORDERED that a verdict of guilty as charged be, and hereby is, entered accordingly.

Whereupon Court rendered its judgment as follows, to wit:

That whereas the said defendant having been

duly convicted in this court of the offense of unlawfully, and wrongfully selling, manufacturing and possessing intoxicating liquor, possessing property designed for the manufacture thereof, and maintaining a common nuisance, in violation of the National Prohibition Act, committed on or about September 22, 1928, and October 25, 1928, respectively, near Butte, in the state and District of Montana, as charged in the information herein;

IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED that for said offenses, you, the said Paul Fall, be confined and imprisoned in the Silver Bow County Jail at Butte, Montana, for the term of FOUR MONTHS on Counts One and Two of the Information herein, and that you be confined and imprisoned in said county jail for the term of FOUR MONTHS on Count Five of said Information, said terms of imprisonment to run consecutively, and that you pay a fine of TWO HUNDRED AND FIFTY DOLLARS on Counts Three and Four of said Information, and be confined in said county jail until said fine is paid or you are otherwise discharged according to law.

Entered in open court December 28th, 1928.

C. R. GARLOW,
Clerk. [6]

THEREAFTER, on January 28th, 1929, assignment of errors was duly filed herein in the words and figures as follows, to wit: [7]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now Paul Fall, the defendant in the above-entitled action, and hereby makes his assignment of errors upon which he will rely, as follows, to wit:

First. The Court erred in denying the motion of the defendant to quash the search-warrant, which motion was filed herein December 27, 1928.

Second. The Court erred in denying the motion of the defendant to suppress certain evidence, which said motion was filed herein December 27, 1928.

Third. The Court erred in overruling the objection of the defendant and admitting the evidence and testimony of Ben Holter.

Fourth. The Court erred in overruling the objection of the plaintiff to the testimony of Ben Holter as follows, to wit:

> "I was out at his place the other side of Silver Bow junction and assisted in a search thereof on the 25th day of October, 1928 with prohibition agents, H. Donald Dribble, and F. S. Chase."

Fifth. The Court erred in overruling the objection of the defendant and permitting the witness Ben Holter to testify as follows, to wit:

> "We first searched the house, a one-room frame, and we found some whiskey in there and took samples of it."

Sixth. The Court erred in overruling the objec-

tion of the defendant and in permitting the witness, Ben Holter, to testify as follows, to wit:

> "There was only a small quantity in the keg."

Seventh. The Court erred in overruling the objection of [8] defendant and in permitting the said Ben Holter to testify as follows, to wit:

> "We then searched the dugout, some little distance from the house and found there two stills set up complete. One a forty-five gallon, and one a sixty gallon; about six hundred gallons of mash, two three hundred gallon vats, and some kegs, burners, and pressure tanks complete and about thirteen gallons of moonshine whiskey."

Eighth. The Court erred in holding and deciding that evidence procured under the search-warrant above referred to was legally procured.

Ninth. The Court erred in finding the defendant guilty under the first count of the Information herein and in pronouncing sentence upon him under the said count.

Tenth. The Court erred in finding the defendant guilty under the second count of the Information herein and in pronouncing sentence against him upon the second count.

Eleventh. The Court erred in finding the defendant guilty under the third count of the Information herein and in pronouncing sentence against him upon said count.

Twelfth. The Court erred in finding the defendant guilty under the fourth count of the Informa-

tion herein and in pronouncing sentence against him upon said count.

Thirteenth. The Court erred in finding the defendant guilty under the fifth count of the Information herein and in pronouncing sentence against him on said count.

Fourteenth. The Court erred in holding and deciding that the search of defendant's residence, dwelling-house and curt*e*l*e*ge was legal.

Fifteenth. The Court erred in holding and deciding that application for search-warrant herein was not defective.

Sixteenth. The Court erred in holding and deciding that the affidavit in support of application for search-warrant was not defective.

Seventeenth. The Court erred in holding and deciding that the complaint and application for search-warrant and affidavit for search-warrant was not defective. [9]

Eighteenth. The Court erred in holding and deciding that the search-warrant introduced in evidence herein was in due form of law and was not defective.

Nineteenth. The Court erred in holding and deciding that there was sufficient showing of probable cause to warrant the issuance of the search-warrant.

Twentieth. The Court erred in giving and rendering judgment herein against the defendant.

WHEREFORE, the defendant, Paul Fall, prays

that the said judgment of the said United States District Court be reversed.

W. N. WAUGH,
Attorney for the Above-named Defendant.

Service of the above and foregoing assignment of errors and prayer for reversal admitted, and copy received this 22d day of January, 1929.

WELLINGTON D. RANKIN,
By R. S.,
United States District Attorney.

Filed Jan. 28, 1928. [10]

THEREAFTER, on January 28th, 1929, notice of appeal was duly filed herein, in the words and figures as follows, to wit: [11]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the Plaintiff Herein and to WELLINGTON D. RANKIN, Esq., Its Attorney:

You and each of you will please take notice that the defendant herein has appealed and does hereby appeal to the United States Circuit Court of Appeals for the Ninth District, from that certain judgment made and entered in the above-entitled case in the above-entitled court on the 28th day of December, 1928, in favor of the plaintiff and against the defendant.

The defendant appeals from the whole and the

said judgment and from each and every part thereof.

W. N. WAUGH,
Attorney for Defendant.

Due service of the above and foregoing notice admitted this 22d day of January, 1929.

WELLINGTON D. RANKIN,
By R. S.,
Attorney for Plaintiff.

Filed Jan. 28, 1929. [12]

THEREAFTER, on January 29th, 1929, bond on appeal was duly filed herein, in the words and figures as follows, to wit: [13]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Paul Fall, as principal, and J. Fred Miles and Andrew Thompson, as sureties, of the county of Silver Bow, State of Montana, are held and firmly bound unto the United States of America in the sum of $1,500, lawful money of the United States of America, to be paid to the said United States, and for the payment of which sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly and severally, firmly by these presents.

Signed with our hands and dated this 21st day of January, 1929.

WHEREAS, the above-named Paul Fall has filed herein an assignment of errors and has served and filed herein a notice of appeal whereby he has appealed from the above-entitled court, to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain judgment made and entered in the above-entitled court and the above-entitled cause, on the 28th day of December, 1928, in favor of the plaintiff and against the defendant,—

NOW, THEREFORE, the condition of this obligation is such that if the above-named Paul Fall shall prosecute the said appeal to effect and answer all damages and costs if he fails to make his said plea good, and if the said Paul Fall shall pay the fine imposed by said judgment and shall appear and surrender himself in execution of the judgment above mentioned upon its being affirmed or modified or upon the said appeal being dismissed, then this obligation shall be void, but otherwise the same shall be and remain in full force [14] and effect.

PAUL FALL,
Principal.
L. FRED MILES,
ANDREW THOMPSON,
Sureties.

State of Montana,
County of Silver Bow,—ss.

On this 21st day of January, 1929, personally appeared before me, a notary public in and for the State of Montana, J. Fred Miles, known to me

to be one of the persons whose name is subscribed to the above, and foregoing instrument, and the said J. Fred Miles being duly sworn, deposes and says that he is a resident and householder, or freeholder of the county of Silver Bow, State of Montana, and is worth the amount named in the foregoing bond, as the penalty thereof over and above his just debts and liabilities and exclusive of the property by law exempt from execution and that his said property consists of the following particularly described property, to wit:

The southwest one-quarter of section twenty-two, township three north, range nine west, Montana Meridian, Silver Bow County, Montana; also a half interest in the estate of T. O. Miles, deceased, not probating in this county. Unincumbered.

He acknowledged that he executed the said bond freely and voluntarily, and for the uses and purposes therein set forth.

L. FRED MILES.

Subscribed and sworn to before me this 21st day of January, 1929.

[Seal] W. N. WAUGH,

Notary Public in and for the State of Montana,

Residing at Butte, Montana.

My commission expires Oct. 6, 1930.

State of Montana,

County of Silver Bow,—ss.

On this 21st day of January, 1929, personally appeared before me, a notary public in and for the State of Montana, Andrew Thompson, known to

me to be one of the persons whose name is subscribed to the above and foregoing instrument, and the said Andrew Thompson being [15] duly sworn, deposes and says that he is a resident and householder, or freeholder of the county of Silver Bow, State of Montana, and is worth the amount named in the foregoing bond as the penalty thereof over and above his just debts and liabilities and exclusive of the property by law exempt from execution, and that his said property consists of the following particularly described property to wit:

Beginning at the N. W. corner of the tract herein described from which the north quarter corner of section 24, Tp. 3 N., R. 9 west, bears north 63° 10′ west, 87.7 feet, then south 77° 17′ east 150 feet, then south 12° 43′ west 150 feet, more or less to the N. P. Ry. Company's right of way, thence north 77° 17′ west along said right of way 150 feet, thence north 12° 43′ east 150 feet to the place of beginning, containing 51/100 acres, more or less, improvements and store building thereon.

He acknowledged that he executed the said bond freely and voluntarily and for the uses and purposes therein set forth.

ANDREW THOMPSON.

Subscribed and sworn to before me this 21st day of January, 1929.

[Seal] W. N. WAUGH,

Notary Public in and for the State of Montana,

Residing at Butte, Montana.

My commission expires Oct. 6, 1930.

The above-named bond approved this 29th day of Jan., 1929.

BOURQUIN,
Judge.

Filed Jan. 29, 1929. [16]

THEREAFTER, on January 29th, 1929, citation on appeal was duly issued and filed herein, being in the words and figures as follows, to wit. [17]

CITATION ON APPEAL.

The United States of America to the United States of America, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, thirty days from and after the day of this citation bears date, pursuant to a notice of appeal filed and served on the United States of America, and filed in the office of the Clerk of the District Court of the United States, in and for the District of Montana at Butte, Montana, on the 28th day of January, 1929, and then and there to show cause, if any there be, why the judgment rendered against Paul Fall, defendant in the case pending in said court entitled United States of America, Plaintiff, vs. Paul Fall, Defendant, as in said notice of appeal is mentioned should not be reversed and corrected, and why speedy justice *should be* done the parties in that behalf.

Dated this 29 day of January, 1929.

BOURQUIN,

Judge of the United States District Court, for the District of Montana.

Stay of execution for 30 days only, provided if the record on appeal be filed in the C. C. A. by said time, stay till appeal determined.

BOURQUIN, J. [18]

Due service of within citation, and receipt of copy hereof, is hereby admitted this January 29, 1929.

WELLINGTON D. RANKIN,
United States Attorney for Montana.

Filed Jan. 29, 1929. [19]

THEREAFTER, on February 5th, 1929, defendant's bill of exception was duly filed herein, being in the words and figures as follows, to wit: [20]

[Title of Court and Cause.]

DEFENDANT'S BILL OF EXCEPTIONS.

BE IT REMEMBERED That in the above-entitled action an information was filed herein on the twenty-sixth day of November, 1928, charging the defendant severally upon five counts, with the sale of intoxicating liquor, the manufacture of intoxicating liquor, possession of property designed for that purpose, possesssion of liquor, and the maintenance of a nuisance; that a bench warrant immediately issued herein, and that thereafter the

defendant was placed under arrest; that thereupon the defendant furnished and filed a bail bond, which said bond was by the Court made returnable December 28, 1928, at 9:30 o'clock A. M., at which time the defendant was ordered to appear for arraignment, plea, and trial; that thereafter, and on the 27th day of December, 1928, the defendant filed herein his motion to quash search-warrant and to suppress certain evidence, which said motion is in words and figures as follows, to wit: [21]

[Title of Court and Cause.]

MOTION TO QUASH SEARCH-WARRANT, SUPPRESS EVIDENCE, ETC.

Comes now the above-named defendant, Paul Fall, by his attorney, W. N. Waugh, Esquire, before arraignment, plea or trial, and respectfully moves this Honorable Court for an order vacating and quashing the search-warrant herein issued by L. M. VanEtten, United States Commissioner of the District of Montana, bearing date October 25th, 1928, which directed a search of the premises therein and not otherwise described as "a ranch with small building used for residence located about five miles in a westerly direction from the town of Silver Bow, Montana," under color of which, on October 25th, 1928, three Federal Prohibition Officers or Agents, namely: Donald Dibble, Ben Holter and John Doe (a more particular designation of said officers, their respective true names,

and their respective official capacities, being to this defendant unknown), entered into and upon this defendant's private dwelling which was then used and for many *month* immediately preceeding said time had been used and occupied by himself and wife as such, exclusively, and not for any business purpose whatsoever, and the curtelege thereof, situated and located on defendant's ranch described as follows, to wit:

> The S. W. Quarter of the N. E. Quarter and the S. E. Quarter of the N. E. Quarter, Section Thirty (30) Township Three (3) North, Range Nine (9) West, Silver Bow county, Montana.

and then and there without his consent and against his wish and will unlawfully searched said dwelling and then and there and therein unlawfully destroyed certain of defendant's personal property, and then and there and therein seized and therefrom removed certain other of his personal property, to wit: approximately two pints of whiskey and the containers thereof, and continuing said search to a certain dugout [22] adjoining said dwelling, and upon the curtelege thereof, and on said premises, and then and there and therein unlawfully destroyed certain personal property of this defendant, and then and there and therein wrongfully seized and took therefrom certain other personal property of this defendant, to wit: The copper heads of two stills; all of which said personal property so unlawfully seized and unlawfully taken by said officers, as aforesaid, was the personal property of this defendant, a citizen of the

United States of America; and said officers thereupon and thereafter, as affiant is informed and believes, delivered all of such seized property to the United States District Attorney for the District of Montana, and he, said District Attorney, intends to use the same against this defendant as evidence in this cause and otherwise, contrary to the provisions of the Constitution of the United States of America, and the Fourth and Fifth Amendments thereto, the Constitution of the State of Montana and Amendments thereto, and the laws of the United States of America and the State of Montana, and the constitutional rights of this defendant; also for an order directing all officers of this court possessing any of such property, to forthwith return the same and all thereof to this defendant, and restraining and enjoining said U. S. District Attorney, and the Federal Prohibition Commissioner of this District, each and both of them, each and all subordinates of either or both of them, from using in any manner or at all any and all of such property and any and all information gained or secured and things discovered as a result of said search and seizure; and for an order suppressing all of such evidence; all for the following reasons, to wit:

That in the proceedings for the issuance of the alleged and pretended search-warrant herein there was no probable cause made to appear to the issuing Commissioner, nor any competent evidence presented to him upon which a finding of probable cause could be predicated. [23]

That the alleged and pretended search-warrant herein was improvidently and unlawfully and improperly issued, solely and not otherwise, upon an application, so called, of one Ben Holter, and a pretended affidavit of one James J. Maloney, as affirmatively appears by the files and records of this court in this cause, and of the said issuing Commissioner's office herein, reference to which is hereby made and had, neither of which, separately or together, contain any showing whatsoever sufficient to warrant a finding of probable cause or the issuance of said search-warrant, particularly in this, to wit:

ONE. (a) Holter's so-called complaint and application for search-warrant, sworn to before the issuing Commissioner on the 25th of October, 1928, is wholly defective and insufficient in that it fails to particularly or otherwise describe the place to be searched.

(b) That said complaint and application is wholly unsupported by any competent affidavit particularly or otherwise describing the place to be searched.

(c) That said so-called complaint and application sets forth no facts other than mere conclusions of the subscriber that tend to establish, or do establish, the alleged conditions which induced, if they do, the said complaint to conclude and believe that any violation of law had been committed.

TWO. (a) That the pretended supporting affidavit of James J. Maloney, adverted to in Holter's said so-called complaint and application, is

not competent evidence for any purpose connected with this application, or otherwise, for the reason that it was neither subscribed or sworn to in the presence of or before the issuing Commissioner, and is mere hearsay.

(b) That said supporting affidavit is further insufficient and deficient in that it fails to particularly or [24] *or* otherwise describe the place to be searched.

(c) That said supporting affidavit, so called, is further particularly defective and insufficient for the reason that the averment thereof to the effect that affiant had purchased intoxicating liquor of this defendant on September 22d, 1928, thirty-two days prior to the issuance of said search-warrant, is too remote to establish, or tend to establish, probable cause, or for any purpose whatsoever herein.

(d) That said supporting affidavit, so called, is further particularly defective and insufficient for any purpose whatsoever for the reason that the averment thereof that affiant purchased of this defendant, on or about September 22d, 1928, at said place, a pint of moonshine whiskey, for which affiant paid defendant Five Dollars, is untrue.

THREE. That the alleged and pretended search-warrant is not in due form of law, for the following reasons, to wit:

That it does not conform to the provisions and requirements of Title XI, Section 6, 40 Stat. 229, Laws of the United States of America, Act of Con-

gress June 15th, 1917, nor of any other statute regulating the issuance and contents of search-warrants, in this,—

(a) No particular or other grounds or probable or other cause for its issue are stated therein;

(b) No name of any person whose affidavit was taken in support thereof by the issuing Commissioner is therein stated;

(c) The place to be searched is insufficiently, inadequately and not at all described therein.

This motion will be based upon the files and records of this court and cause, the record of said issuing commissioner, and supported by oral testimony.

W. N. WAUGH,
Attorney for Said Defendant. [25]

United States of America,
The State of Montana,
County of Silver Bow,—ss.

Paul Fall, being first duly sworn, on his oath deposes and says: I am the defendant named and mentioned in the above and foregoing and within motion to quash search-warrant, suppress evidence, etc.; I have read the said pleading, know all of its contents, and the whole thereof is true.

PAUL FALL,

Subscribed and sworn to before me, this 27th day of December, A. D. 1928.

[Notarial Seal] W. N. WAUGH,
Notary Public for the State of Montana, Residing at Butte, Silver Bow County, Montana.

My commission expires October 6th, A. D. 1930.

Service of the within and foregoing motion to quash search-warrant, suppress evidence, etc., admitted and copy thereof received, this 27th day of December, A. D., 1928.

HOWARD A. JOHNSON,
Asst. U. S. Attorney.

Filed December 28, 1928. [26]

And on the said 27th day of December, 1928, the defendant filed herein a notice that the said motion would be for hearing in the courtroom of the said court at 9:30 o'clock A. M., on the 28th day of December, 1928, which said notice was duly served upon plaintiff.

That on the 28th day of December, 1928, at 9:30 o'clock A. M. the said motion was called to the attention of the Court.

Upon the calling of this case for trial, counsel for defendant informed the Court that he had theretofore served and filed a written motion to quash the search-warrant and to suppress certain evidence. The Court then stated that the motion would be taken up and heard at the same time, and in the course of the trial that if the evidence was found to be incompetent, defendant would be given the benefit thereof, and such evidence would be suppressed. Thereupon, counsel for defendant asked that it be understood that all such evidence introduced would go in subject to said motion and objection, and it was so agreed and understood.

Said case came on for trial on the 28th day of December, 1928, before the Honorable George M. Bourquin, Judge of the said court, a jury being

expressly waived by the defendant. Wellington D. Rankin, United States District Attorney for the District of Montana, appeared for the plaintiff, and William N. Waugh appeared as counsel for the defendant. The defendant was present in person.

Whereupon, subject to the said motion to quash search-warrant and to suppress certain evidence, the plaintiff produced certain witnesses, the defendant produced certain witnesses, and the plaintiff produced certain witnesses in rebuttal, which said witnesses were duly sworn and testified and gave certain testimony. [27]

That during said trial and on the 28th day of December, 1928, the following testimoney was taken and proceedings had to wit:

TESTIMONY OF F. S. CHASE, FOR PLAINTIFF.

F. S. CHASE, called as witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by WELLINGTON D. RANKIN.

My name is F. S. Chase. I am a federal prohibition agent for this district. On September 22d, 1928, I went out to a ranch southwest of Butte with Agent Maloney, and we bargained with the defendant, Paul Fall, for forty gallons of moonshine whiskey at $5.50 a gallon, gave him a deposit of $5.00 down on the same, and took a sample of a pint thereof. Agent Maloney was with me in the whole transaction.

(Testimony of F. S. Chase.)

Cross-examination by W. N. WAUGH.

I was with Agent Maloney when he made an affidavit for a search-warrant based upon the transaction that I have related in my direct examination. I have examined the affidavit for search-warrant which you show me, the same being on file and of record in this case No. 2021, entitled United States of America, Plaintiff, vs. Paul Fall, Defendant. I did not make the affidavit, but I was with Agent James J. Maloney when he made the same before United States Commissioner Brass, at Helena, Montana, on the date mentioned therein. It states the facts, and I know nothing further of the search-warrant proceedings.

TESTIMONY OF JAMES J. MALONEY, FOR PLAINTIFF.

JAMES J. MALONEY, called as witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by WELLINGTON D. RANKIN.

My name is James J. Maloney, and I am a Federal Prohibition Agent for this District. On the 22d day of September, 1928, Agent Chase and myself went out to a ranch southwest of Butte in the hills beyond Silver Bow Junction. We asked the defendant Fall [28] if he could sell us some whiskey, and he said he could let us have thirty-five

(Testimony of James J. Maloney.)
or forty gallons. We bargained for forty gallons at $5.50 a gallon. Fall said that it was customary for persons to show good faith by making a deposit of $5.00 or $10.00, so we gave him a deposit of $5.00 on the whiskey, and he gave us a pint bottle as a sample. Just previous thereto he had given us each a drink of the whiskey in his house. This transaction took place in front of his house and in the house on the ranch. He told us that he did not have the whiskey there and that he would have to get it from the cashe and for us to come back the next day. We told him we would. I never went back, but I wrote him from Dillon.

Cross-examination by W. N. WAUGH.

The transaction I have related took place just in front of and in the house of defendant, Fall. His wife was in the house and she heard some of the conversation between us. I made the affidavit for a search-warrant which you show me and which is on file and of record in this case No. 2021. It was made by me before United States Commissioner Brass at Helena, Montana. It states that I visited the place and purchased of Paul Fall a pint of moonshine whiskey, for which the sum of $5.00 was paid. It states the truth. When we were at the Fall place we bargained for forty gallons of moonshine whiskey and we had two drinks, Chase and myself one each, in the residence, at the time, given to us by Fall. The $5.00 was a deposit on the forty gallons. I did not go back afterwards.

(Testimony of Ben Holter.)

I think the affidavit was mailed either to Commissioner Van Etten or to Agent Ben Holter. I did not appear before him personally.

TESTIMONY OF BEN HOLTER, FOR PLAINTIFF.

BEN HOLTER, called as witness on behalf of the plaintiff, having been first duly sworn, testified as follows: [29]

Direct Examination by WELLINGTON D. RANKIN.

My name is Ben Holter, and I am a Federal Prohibition Officer and I know this defendant. I was out at his place the other side of Silver Bow junction and assisted in a search thereof on the 25th day of October, 1928, with Prohibition Agents H. Donald Dribble and F. S. Chase. We first searched the house, a one-room frame, and we found some whiskey in there and took samples of it. There was only a small quantity in a keg. We then searched the dugout, some little distance from the house and found there two stills set up complete. One a forty-five gallon, and one a sixty gallon; about six hundred gallons of mash, two three hundred gallon vats, some kegs, burners, and pressure tanks complete, and about thirteen gallons of moonshine whiskey.

Cross-examination by W. N. WAUGH.

We had a search-warrant and this search was

(Testimony of Ben Holter.)

made by virtue thereof. The warrant which you show me, as one of the files in this case, is the warrant. I made the application that you show me for this warrant, the same being designated complaint and application for search-warrant and a file in this case. The affidavit for search-warrant which you show me, which is also filed in this case, was the supporting affidavit of James J. Maloney made on the 27th day of September, 1928, with my application for a search-warrant. This proceeding was had before the United States Commissioner Van Etten here in Butte on the 25th day of October, 1928. I do not know now whether Maloney's affidavit was mailed direct to Van Etten or whether I brought it there when I filed my application. Maloney was not personally before the commissioner.

(By the COURT.)

Q. About how far from the house did you find this whiskey?

A. About three hundred yards. [30]

Plaintiff rests.

TESTIMONY OF L. M. VAN ETTEN, FOR DEFENDANT.

L. M. VAN ETTEN, called as witness on behalf of the defendant, having been first duly sworn testified as follows:

My name is L. M. Van Etten. I am a United States Commissioner for this District, and I issued the search-warrant which you show me, dated the 25th day of October, 1928, directing a search of

(Testimony of L. M. Van Etten.)
premises, described as "A ranch with a small building used for residence, located about five miles in a Westerly direction from the town of Silver Bow, Silver Bow County, Montana," and I caused the said warrant and the record proceedings therefor to be filed with the Clerk of this court in this cause upon return of said warrant to me. The affidavit for search-warrant of James J. Maloney, sworn to before Commissioner Brass, at Helena, Montana, on the 27th day of September, 1928, and the complaint and application for search-warrant sworn to and presented to me on the 25th day of October, 1928, by Agent Ben Holter, constituted all of the evidence which was presented to me upon said application for a search-warrant and was all the evidence that I had upon which to base my finding of probable cause.

Said James J. Maloney did not appear before me personally and I neither swore him nor took his affidavit or deposition myself.

TESTIMONY OF PAUL FALL, ON HIS OWN BEHALF.

PAUL FALL, being called as a witness on his own behalf and being first duly sworn, testified as follows:

My name is Paul Fall. I am a rancher, and I live on a ranch near Silver Bow junction, in Silver Bow County, Montana, and I have lived there for the last past fifteen years. My wife and family live with me in my residence, located on said ranch

(Testimony of Paul Fall.)

and we have a small dwelling-house and other buildings and enclosures all located on the southwest quarter of the northeast quarter and the southeast [31] quarter of the northeast quarter of section 30 in township 3 north, of range 9 west, in Silver Bow County, Montana. My said residence and dwelling-house, enclosures, and the outbuildings and curt*e*l*e*ge thereof, are situated on a small portion of these two forties. My residence and the curt*e*l*e*ge thereof and a dugout thereon was searched by Federal Prohibition Officers on the 25th day of October, 1928 upon a search-warrant. The search-warrant that you show me, being a part of the files of this case, No. 2021, is the search-warrant, and I was served with a copy of it just before the search was made. There were three federal officers who made the search. Officer Ben Holter, and two whose names I do not know, but I think one was Agent Dribble, first searched my dwelling-house. They ransacked everything in the house and seized, and took away with them a couple pints of whiskey; they then searched the dugout on the premises, seized and took with them the copper heads of two stills. The search was without my consent and against my will. The premises referred to are all mine, and were occupied by myself and family as our residence at the time of the search, and the property that they took with them and s*ie*zed was my property and then in my possession. I am informed that they delivered this property to the

(Testimony of Paul Fall.)
United States District Attorney for use against me in this case.

Before the search was made, and on the 26th day of September, 1928, I was at work about a half mile from the ranch and a car drove up and stopped some distance away. A man came over to me from the car, Agent Maloney here, and asked me if I would sell him some whiskey. I asked him who told him that I had any whiskey for sale. I told him I had no whiskey for sale, and he then said that his partner in the car was very sick and wanted to know if I wouldn't get some whiskey for him. I told him I had no whiskey for sale, but under those circumstances, that if he would come down to my house, I would give them a drink. It was about quitting time, so [32] I unhooked my team and drove them down to the house. This man preceeded me to the house in the car with the other man. When I got to the house the three of us entered. It is a small one-room house, formerly a garage. I went to the corner of the room and gave the two men one drink each out of a small bottle, about a pint of whiskey. When they had drunk the whiskey, one of them said, "That is pretty good whiskey; can we buy some of it?" I asked them how much they wanted to buy, and they said they would take a lot—thirty-five or forty gallons, if they could get it, and they asked how much it would cost. I told them, I did not know, but I thought I could get it for them, and that if I could get it for them, it would probably cost $5.50 a

(Testimony of Paul Fall.)

gallon. That I was not sure about it, but I would find out the next day, and let them know when they came back; they said all right they would come back the next day and find out; I should let them know then. Just before they left the house one of them wanted to know if they could not get a small bottle then. I told them that the bottle that I gave them to drink out of was all the whiskey I had. It was. They said something about this man being very sick, and I said, "Well, that is all I have, but if that is of any use to you, you can have it." There was absolutely nothing said about money for this pint of whiskey. I did not sell it to them, but gave it to them as a guest in my house on his statement that I have related. I never sold them or anyone else any whiskey on or about the times mentioned. One of them put this pint bottle in his pocket and the three of us went out of the house. My wife was there within five or six feet from us during all the time we were in the house, and she could hear and did hear the conversation and all of it. We were not there over five or six minutes. I went with them as far as their car, a few yards [33] from the house, and when I returned my wife handed me a $5.00 bill and told me that one of these men must have let it there at the time. She stated that she found it on the washstand close to the rim of the wash-bowl, where I had given them the drink of whiskey. I never saw this $5.00 bill before. I did not see it placed there or left there, and I did not know it was left there.

(Testimony of Paul Fall.)

Cross-examination by WELLINGTON D. RANKIN.

I did not sell Agent Maloney or Chase or either of them any whiskey on the 22d day of September, 1928, or at any other time. I gave them a drink each in my house, while they were there at my invitation, but I never sold them anything. One of the men appeared to be sick, and he complained of being sick. I told these men I would find out if I could get them thirty-five or forty gallons of whiskey, and that they were to come back the next day and I would let them know. No, I did not make this whiskey.

TESTIMONY OF MRS. PAUL FALL, FOR DEFENDANT.

Mrs. PAUL FALL, being first duly sworn, testified as witness on behalf of the defendant as follows, to wit:

Direct Examination by W. N. WAUGH.

My name is Mrs. Paul Fall, and I am the wife of the defendant, Paul Fall, and I live on his ranch and in the dwelling-house he described in his testimony. I have lived there with him about fifteen years. We homesteaded the place. I was in our dwelling-house there on the 22d day of September, 1928, when my husband brought in a couple of strange men. He took them to the corner of the room to a small table or washstand and poured

(Testimony of Mrs. Paul Fall.)
each of them out a drink of whiskey from a small bottle he had there. There was some ordinary conversation and after they drank the whiskey one of them remarked that it was very good, and wondered if they could get some of it. My husband asked them how much they wanted to get, and they told him [34] that they wanted forty gallons, and they asked how much it would cost them. My husband told them that he thought it would cost them $5.50 a gallon and he would inquire if he could get any for them, and let them know later on, if they would come back the next day. That was about all that was said at that time, and they started to leave the house. Just before leaving, one of them asked my husband if they could not get a pint then, and my husband told them that all he had was what was left in the bottle that they had drunk from. One of the two said that one of them was very sick. I am not sure which one it was, and that they wanted this for him on that account of his being sick. One of them did actually look sick. My husband further said they could have what was left in the bottle in that case and one of them took it and all three left the house. I would say that they were not there more than five or ten minutes. My husband went out to the car with them and returned almost immediately. When they left, I had occasion to go into the corner where they drank, and I discovered that someone had left a $5.00 bill on the washstand and partly concealed by the wash basin. I did not see it left there, so I do not

(Testimony of Mrs. Paul Fall.)
know who did leave it there. I picked it up, and when my husband came back I handed it to him. He was just as surprised as I was. My husband did not charge them for the drinks that he gave them, nor for the bottle that they got from him, and I heard no mention of money whatever in the whole conversation, except the price of $5.50 a gallon which my husband said he thought the whiskey would cost them which they desired to buy, if he could get it at all for them. There was no whiskey sold to these men or to anyone else that I know of.

Cross-examination by WELLINGTON D. RANKIN.

Q. Mrs. Fall, you know your husband had stills there, did you not?

Mr. WAUGH.—Objected to as improper examination.

By the COURT.—Sustained.

Mr. RANKIN.—No further cross-examination. [35]

Defendant rests.

TESTIMONY OF JAMES J. MALONEY, FOR PLAINTIFF (RECALLED IN REBUTTAL).

JAMES J. MALONEY, a witness for plaintiff, was recalled in rebuttal and testified as follows, to wit:

(Testimony of James J. Maloney.)

Direct Examination by WELLINGTON D. RANKIN.

I have heard the references made by the defendant and his witness with regard to someone being sick. There was nothing said to Mr. Fall or to anyone while we were at his ranch about anyone being sick. No one was sick. He did not give us the whiskey; we bargained for forty gallons and we paid him $5.00 as a deposit thereon, as he stated at the time that we should show some good faith by a deposit of $5.00 or $10.00; so we gave him $5.00.

Cross-examination by W. N. WAUGH.

Neither Agent Chase or myself was sick at the time. Chase had no boil on his neck and there was absolutely nothing said about either of us being sick.

TESTIMONY OF F. S. CHASE, FOR PLAINTIFF (RECALLED IN REBUTTAL).

F. S. CHASE was recalled as a witness upon rebuttal on part of the plaintiff, and testified as follows, to wit:

Direct Examination by WELLINGTON D. RANKIN.

There was absolutely nothing said at the time about anyone being sick.

Cross-examination by W. N. WAUGH.

I did not have a boil on my neck at that time, and

I was not sick, and Agent Maloney, who was with me, was not sick, and there was no such representation made.

The complaint and application for search-warrant, and affidavit for search-warrant, and search-warrant referred to in the testimony of F. S. Chase and Ben Holter, hereinabove, were filed herein on the 14th day of November, 1928, and are in words and figures as follows, to wit: [36]

Before L. M. VAN ETTEN, United States Commissioner for the District of Montana.

United States of America,
District of Montana,—ss.

COMPLAINT AND APPLICATION FOR SEARCH-WARRANT.

Ben Holter, being first duly sworn on oath, deposes and says that he is a Federal Prohibition Agent, that he makes this complaint and affidavit for the purpose of procuring a search-warrant, authorizing the search of the premises herein described, that he has just and probable cause to believe and does believe, that the intoxicating liquor is now unlawfully manufactured, kept for sale, sold, used, given away and disposed of, in violation of Title II of the *Nation* Prohibition Act, at and within those certain premises, buildings, cellars, sub-cellars, basements, rooms, outbuildings, closets, safes, desks, drawers, containers, trunks and other receptacles, in connection therewith, in that certain

room, place or building more particularly described as:

A ranch with small building used for residence, located about 5 miles in a westerly direction from the town of Silver Bow, Montana.

That the following are the reasons for this applicant's belief: that he has been heretofore informed, that intoxicating liquor is unlawfully manufactured, kept for sale, sold, used, given away or disposed of, by the defendant, Paul Fall, and other persons, in violation of the laws of the United States of America, in and upon said premises, and that particularly were the laws so violated on the 22d day of September, A. D. 1928, as well as at this time.

That the applicant has procured an affidavit from one James J. Maloney, setting forth that on the above date, he, the said James J. Maloney, was within said premises and purchased one pint of moonshine whiskey from Paul Fall for which he paid the sum of $5.00.

That said affidavit is herewith submitted to the United States Commissioner, and made a part of this application, as a basis for the issuance of a search-warrant.

That the persons occupying the said premises were and are using the same in violation of Title II of the National Prohibition Act, as aforesaid, and the said property was then and now is, upon the said premises to be searched and that all of said property is located within the District of Montana.

Wherefore, this applicant prays that a search-warrant be issued according to law, and the said warrant be directed to the Commissioner of Prohibition and to any administrator, assistant administrator, deputy administrator or federal prohibition agent or officer, and to any other civil officer of the United States duly authorized to enforce or assist in enforcing any laws of the United States, or any or either of them, commanding that they or either of them, make diligent search of the premises herein described, in accordance with law.

BEN HOLTER.
(Applicant.)

Subscribed and sworn to before me this 25th day of Oct., A. D. 1928.

L. M. VAN ETTEN,
United States Commissioner for the State of ————. [37]

United States of America,
District of Montana,—ss.

AFFIDAVIT FOR SEARCH-WARRANT.

James J. Maloney, being first duly sworn, deposes and says that he is acquainted with one Paul Fall, whose other and true name is to this affiant unknown, but who is the person who is hereinafter referred to as Paul*l* Fall and who was on the 22d day of September, 1928 in charge of that certain room, place or building more particularly described as a ranch with a small building used for a residence, located about 5 miles in a westerly direction, from the town of Silver Bow, State of Montana.

That on the above-mentioned date this affiant visited the said place and purchased of the said Paul*l* Fall a pint bottle of moonshine whiskey; and for which the said Paul Fall was paid the sum of $5.00.

That the said Paul Fall and other persons, to this affiant unknown, were keeping stored in and about said premises a quantity of intoxicating liquor which said intoxicating liquor was kept possessed and sold in and about said place by them in violation of the laws of the United States of America and particularly Title II of the National Prohibition Act.

That this affiant knows the reputation of the said Paul Fall and of the place above described, and knows that he bears the reputation of being a person who keeps for sale and sells intoxicating liquors unlawfully and that said place bears reputation of being a place where intoxicating liquors are unlawfully sold.

That this affiant knows of his own knowledge that the said property so unlawfully possessed, kept, sold and used, was then on said premises and is positive that the same is still kept, possessed, sold and used thereon.

(Signed) JAMES J. MALONEY.

Subscribed and sworn to before me this 27th day of September, A. D. 1928.

Here make full statement of facts.

[Seal] J. H. BRASS,

Dist. of Montana U. S. Commissioner. [38]

Before L. M. VAN ETTEN, United States Commissioner for the District of Montana.

United States of America,
District of Montana,—ss.

SEARCH-WARRANT.

The President of the United States of America, to the Commissioner of Prohibition and to Any Administrator, Assistant Administrator, Deputy Administrator or Federal Prohibition Agent or Officer, and to Any Other Civil Officer of the United States Duly Authorized to Enforce or Assist in Enforcing Any Laws of the United States, or Any or Either of Them, GREETINGS:

WHEREAS, I, L. M. Van Etten, a United States Commissioner for the District of Montana, have examined on oath Ben Holter, a duly appointed and qualified federal prohibition agent, applicant herein, and have examined the affidavit of James J. Maloney, produced by said applicant and filed by him with me in this case, and it appearing therefrom that certain intoxicating liquors fit for use as a beverage, was and is being kept for sale, sold, exchanged, used and disposed of, and that certain distilling, brewing, or wine making utensils and apparatus, mash and other materials designed and intended for use in the manufacture of intoxicating liquor, have been and are now being kept, possessed, used and employed in that certain place, room or building more particularly described as:

A ranch with small building used for residence, located about 5 miles in a westerly direction from the town of Silver Bow, Montana.

WHEREAS, the particular facts upon which this warrant is issued and probable cause is found by me to exist are as follows, to wit:

That the application of Ben Holter, Federal Prohibition Agent, and the affidavit of James J. Maloney, produced by him and filed herein, set forth that the said James J. Maloney, on or about the 22d day of Sept., 1928.

Was within said premises and purchased one pint of moonshine whiskey from Paul Fall for which he paid the sum of $5.00.

And that a quantity of intoxicating liquor was and is being kept, possessed, stored, sold and used in and upon said premises in violation of Title II of the National Prohibition Act.

That the said Paul Fall bears the reputation of being a person who keeps for sale and sells and manufactures, intoxicating liquor, and the premises hereinabove described, bear the reputation of being a place where intoxicating liquors are kept for sale and sold and manufactured in violation of the laws of the United States of America.

And whereas, I, the undersigned, do find that there is probable cause to believe that the statements set forth in the said application and affidavits for the warrant are true and sufficient, and that intoxicating liquors are manufactured, kept for sale and sold in said premises or on the person of said keeper or other persons in said premises.

Now, therefore, you are hereby commanded in the name of the President of the United States, to enter said premises in the daytime, with necessary and proper assistance and there diligently search for said intoxicating liquors, vessels, bottles and containers of said liquors, whether in the said premises or [39] on the person of the said keeper or other persons present, and all utensils, apparatus and materials for the manufacture of intoxicating liquors, or for the storing and possessing of the same, and all evidence of crime, of manufacturing, purchasing, possessing, selling or disposing of intoxicating liquors, as may be therein found in the form of books, recipes for manufacturing or compounding intoxicating liquors, receipts, bills of lading, notes, checks, liquor labels, letters and other such evidences, whether found in the premises or on said persons and to report any act concerning same, as required by law of you, and to seize, secure and bring the said property with a return of your actions thereunder to the undersigned.

You are further co*ma*nded that in the event you seize or take said liquors or other property or evidence under this warrant, to give a copy of this warrant together with a receipt for each and everything so seized, itemized in detail as nearly as may be, to the person from whom it is taken by you or in whose possession it is found or in case no person is present to leave a copy of this warrant with a receipt as aforesaid, in the place from which the said property is taken, and you are commanded to execute and return to the undersigned

this warrant with your return thereof and inventory of all property taken, duly made and verified by you within ten days from date hereof.

Given under my hand and seal at my office this 25 day of October, A. D. 1928.

L. M. VAN ETTEN,

United States Commissioner for the District of Montana.

RETURN.

United States of America,
District of Montana,—ss.

I hereby certify that I received the within warrant on the 25th day of October, A. D. 1928, and that by virtue of said warrant and authority contained herein I did this 25th day of October, 1928, search the premises described therein and found and seized the following described liquors, properties and utensils, possessed and unlawfully used for the manufacture, sale and possession of intoxicating liquor, to wit:

5 gal. in residence, whiskey.
8 gal. at still 300 yards north of house, whiskey.
2 stills, 1 45-gal. and 1 60-gal.
600 gal. mash.
5 kegs.
1 burner, pressure tank and utensils complete.

(a) I hereby certify that I then and there served said warrant by given notice of the contents thereof and gave a copy of the within warrant together with a complete inventory of the property seized to Paul

Fall who was present and in possession of the property seized.

(b) I hereby certify that in the absence of anyone claiming ownership or possession of the articles seized, I left at the place of seizure, a copy of the within warrant, together with an itemized receipt for the property taken.

I, H. Donald Dibble, the officer by whom this warrant was executed, do swear that the above statement and inventory contains a detailed and true account of all property seized and acts done by me under authority of said warrant.

H. DONALD DIBBLE.

Subscribed and sworn to before me this 7th day of November A. D. 1928. [40]

L. M. VAN ETTEN,
U. S. Commissioner.

P. S. You will use paragraphs marked (a) or (b) in keeping with the facts and cancel the other paragraph.

Filed November 7, 1928.

L. M. VAN ETTEN,
U. S. Commissioner.

Filed Nov. 14, 1928. [41]

At the conclusion of the said testimony, the cause was argued and submitted to the Court for its decision and the said Court thereafter made an order denying said motion to quash, etc., held the evidence competent, but without that secured in the house, that from the dugout sufficed to prove defendant guilty as charged, and duly sentenced him accord-

ingly; to which order the plaintiff duly accepted and made and entered herein judgment in writing whereby the defendant was found guilty upon all of the said five counts of the said information.

The above and foregoing constitutes all of the evidence and no other proceedings were had or taken herein nor any other evidence heard than is above set out.

That on the fourth day of January, 1929, on motion of the defendant herein IT WAS ORDERED that the time allowed to the defendant in which to prepare, serve, and file a bill of exceptions herein be extended for a period of ten days in addition to that allowed by law and under the rules of this Court therefor, and within the time so allowed by the rules of the above-entitled court and within the time allowed by said order, the defendant presents the foregoing as his bill of exceptions to the ruling as made on the motion of the defendant to quash search-warrant and to suppress certain evidence herein, and to the rulings made and proceedings had at the trial of the above-entitled action.

Dated this 6th day of January, 1929.

W. N. WAUGH.
JOHN A. SHELTON,
Attorneys for the Defendant.

Services of the foregoing bill of exceptions and receipt of copy admitted this 14th day of January, 1929.

WELLINGTON D. RANKIN,
United States District Attorney. [42]

STIPULATION RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the above and foregoing bill of exceptions is true and correct and that the same may be forthwith signed, allowed as correct, and ordered filed, and right to propose amendments to the said bill of exceptions is waived by the plaintiff herein.

Dated this 6th day of January, 1929.

——————————,
Attorney for Plaintiff.
W. N. WAUGH,
JOHN A. SHELTON,
Attorneys for Defendant.

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

United States of America,
State of Montana,—ss.

I, George M. Bourquin, Judge of the above-entitled court, do hereby certify that the above and foregoing bill of exceptions is true and correct and the same is allowed, settled as correct and ordered filed.

Dated this 5th day of February, 1929.

BOURQUIN,
Judge.

Filed Feb. 5, 1929. [43]

THEREAFTER, on February 5th, 1929, praecipe for transcript on appeal was duly filed herein, being in the words and figures as follows, to wit: [44]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To the Clerk of the United States District Court for the District of Montana:

Please prepare a transcript on appeal to the United States *Circuit of* Appeals from a judgment of conviction made and entered in the said United States District Court on the 28th day of December, 1928, in the above-entitled case, which shall include the following:

(1) Information filed herein November 26th, 1928.

(2) Defendant's bill of exceptions filed herein February 6th, 1929.

(3) Judgment of conviction made and filed herein December 28th, 1928.

(4) Assignment of errors filed herein January 28th, 1929.

(5) Notice of appeal filed herein January 28th, 1929.

(6) Bond on appeal filed herein January 30th, 1929.

(7) Citation filed herein January 30th, 1929.

W. N. WAUGH,
Attorney for Defendant.

Filed Feb. 5, 1929. [45]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 46 pages, numbered consecutively from 1 to 46, inclusive, is a true and correct transcript of the record and proceedings had in the within entitled cause and of the whole thereof required, by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said Court and cause in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of said transcript amount to the sum of Five and 90/100 Dollars, ($5.90), and have been paid by the appellants.

WITNESS my hand and the seal of said court at Butte, Montana, this 21st day of February, A. D. 1929.

[Seal] C. R. GARLOW,
Clerk as Aforesaid.
By L. R. Polglase,
Deputy Clerk. [46]

[Endorsed]: No. 5742. United States Circuit Court of Appeals for the Ninth Circuit. Paul Fall, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed February 27, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

NO. 5742

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

WILLIAM N. WAUGH,

Attorney for Appellant.
Butte, Montana.

Filed.., 1929.

...., Clerk.

FILED

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NO. 5742

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

STATEMENT OF THE CASE.

On November 26th, 1928, an information was filed in the United States District Court for the District of Montana, which was in five counts, and separately charged the Defendant, Paul Fall,

1st. With having on the 22nd day of September, 1928, in Silver Bow County, Montana, sold wrongfully and unlawfully, intoxicating liquor, to-wit, whiskey;

2nd. With having, on the 25th day of October, 1928, wrongfully and unlawfully manufactured intoxicating liquor, to-wit: whiskey;

3rd. On the same day, with having wrongfully and unlawfully had and possessed property designed for the manufacture of intoxicating liquor;

4th. On the same day, with having wrongfully and unlawfully in his possession, intoxicating liquor, to-wit, whiskey;

5th. On the same day with having wrongfully and unlawfully maintained a common nuisance. (T. 1-5.)

The Defendant entered a plea of not guilty.

The said case was set for trial, and thereupon the defendant filed with the said court, a motion to quash search warrant, and suppress evidence. The said motion asked the Court to quash Search Warrant which had previously been issued by United States Commissioner for the District of Montana, L. M. Van Etten, and by virtue of which the search had been made of the dwelling house of the defendant and the search made of the dugout near thereto and under which a certain quantity of whiskey had been seized in the dwelling house, and a certain amount of whiskey and two stills and other equipment had been seized in said dugout.

Said motion also asked the court to quash the so-called complaint and application for said search warrant, and pretended supporting affidavit of James J. Maloney, and the evidence procured by means of said so-called search warrant.

The said motion was made upon the grounds:

1st. That the said so-called complaint and application for search warrant were defective and un-

lawful in that they failed to particularly describe the place to be searched;

2nd. They did not contain a statement of evidentiary facts but merely alleged conclusions;

3rd. That so-called supporting affidavit of James J. Maloney was not subscribed to and sworn to in the presence of said Commissioner;

4th. That said supporting affidavit was insufficient in that it failed to particularly describe the place to be searched;

5th. That the time alleged in said affidavit of the alleged sale of whiskey was too remote;

6th. That said alleged supporting affidavit, application and complaint did not comply with the Constitution or Laws of the United States. (T. 18-23.)

The said motion was noticed for hearing for the 28th day of December, 1928, and on the said day the said motion was called to the attention of the Court. The said case came on for trial and said motion was again called to the attention of Court, who said that the said motion would be taken up and heard in the course of the trial, and if the evidence was found to be incompetent it would be excluded in consideration of the case and the Defendant would be given the benefit of said motion. It was thereupon understood and agreed that all evidence offered by the Government would go in, subject to said motion (T. 24). Thereupon the trial of said case proceeded, trial being had to the Court without a jury.

The affidavit of James J. Maloney just referred to was sworn to before J. H. Brass, United States Commissioner for the District of Montana on the 27th day of Septem-

ber, 1928, and was to the effect that on the 22nd day of September, 1928, he had purchased from the defendant a pint of whiskey and paid for it the sum of $5.00 (T. 41, lines 1-5). He and F. S. Chase testified for the Government that on the said day they had entered into a contract for the purchase from the Defendant of 40 gallons of moonshine whiskey, delivery to be made in the future, and deposited the sum of $5.00 on account of the purchase price. (T. 25-27.)

Except for the testimony of Chase and Maloney the evidence on the part of the government consisted entirely of the testimony of Ben Holter, who testified that he had made a search by virtue of said warrant. The search was made of the said dwelling house and they found a small quantity of whiskey there and found also in the dugout, a short distance from the house, an additional quantity of whiskey, mash and certain stills and other paraphernalia. (T. 28-29.)

Said complaint and application for search warrant and supporting affidavit were filed in the case and heard and considered on the trial (T. 38-46). L. M. Van Etten, Commissioner of the District of Montana, testified on behalf of the defendant to the effect that said James J. Maloney did not appear before him and was not examined by him and that said complaint and application for search warrant and affidavit of James J. Maloney were all the evidence heard and considered by him, and that upon them he issued said search warrant (T. 29-30). The defendant and his wife gave testimony on behalf of the defendant.

The case was argued to the Court, who overruled said motion to quash and suppress said evidence and the said complaint and application for search warrant and supporting affidavit of James J. Maloney and the said search warrant, and found defendant guilty upon all of said five counts and sentenced him to imprisonment for four months on counts one and two, and to an additional four months imprisonment on count five, and to pay a fine of $250 on counts three and four (T. 6-7), from which judgment of conviction defendant has appealed.

SPECIFICATION OF ERROR.

1. The Court erred in denying the motion of defendant to quash said search warrant.

2. The Court erred in overruling motion to quash said affidavit of James J. Maloney, the complaint and application for search warrant.

3. The Court erred in denying the motion of Defendant to suppress evidence which was procured by virtue of said warrant.

4. The Court erred in overruling the objection of the Defendant and admitting testimony of Ben Holter.

5. The Court erred in overruling objection of Defendant to testimony of Ben Holter, which was as follows:

> "I was out at his place the other side of Silver Bow junction and assisted in a search thereof on the 25th day of October, 1928, with Prohibition agents H. Donald Dibble and F. S. Chase."

6. The Court erred in overruling objection of defendant permitting the witness Ben Holter to testify as follows:

> "We first searched the house, a one-room frame, and we found some whiskey in there and took samples of it."

7. The Court erred in overruling objection of defendant permitting witness Ben Holter to testify as follows:

> "There was only a small quantity in the keg."

8. The Court erred in overruling the objection of defendant permitting the said Ben Holter to testify as follows:

> "We then searched the dugout, some little distance from the house and found there two stills set up complete. One a forty-five gallon and one a sixty gallon; about six hundred gallons of mash, two three hundred gallon vats, and some kegs, burners, and pressure tanks complete and about thirteen gallons of moonshine whiskey."

9. The Court erred in holding that evidence procured on account of said search was legally procured.

10. The Court erred in finding Defendant guilty on the second count, and in pronouncing judgment against him on said count.

11. The Court erred in finding defendant guilty on the third count and pronouncing sentence against him upon said count.

12. The Court erred in finding defendant guilty on the 4th count and pronouncing sentence against him upon said count.

13. The Court erred in finding Defendant guilty on the 5th count and pronouncing sentence against him upon said count.

14. The Court erred in holding and deciding that said application for search warrant was not defective.

15. The Court erred in holding and deciding that the search of defendant's residence and dugout was legal.

16. The Court erred in holding and deciding that said affidavit in support of search warrant was not defective.

17. The Court erred in holding and deciding that complaint and application for search warrant and affidavit for search warrant were not defective.

18. The Court erred in holding and deciding that search warrant produced in evidence was in due form of law and was not defective.

19. The Court erred in holding and deciding that there was sufficient showing of probable cause to warrant the issuance of said warrant.

20. The Court erred in rendering a judgment of conviction herein against defendant upon counts 2, 3, 4 and 5 of said information.

21. The Court erred in pronouncing sentence against Defendant jointly upon counts 1 and 2 of said information.

BRIEF OF ARGUMENT.

The contention of appellant is that all of the evidence procured by virtue of said search warrant was procured in violation of the Constitution and laws of the United States and for that reason should not have been received or considered by the Court and that as a consequence there could have been no conviction upon either of counts 2, 3, 4 or 5 of the information and as a consequence also the sentence pronounced jointly upon counts 1 and 2 of the information is erroneous and must be reversed.

There are three particulars in which the proceedings which resulted in said search warrant and the said search warrant itself were defective and there was no proper foundation for the issuance of said search warrant.

The language of the

Fourth Amendment to the Constitution of the United States is as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States upon which we also base our contentions contains a clause to the effect that

"No person * * * shall be compelled in any criminal case to be a witness against himself."

The provisions of the

> Espionage Act, (40 Stat. 228) U. S. C. A.—Tit. 18; Sec. 611 to 631.

made applicable under the provisions of the National Prohibition Act (41 Stat. 315; U. S. C. A.—Tit. 27—Sec. 39) are:

"A search warrant cannot be issued but upon probable cause, supported by affidavit, naming or describing the person and particularly describing the property and the place to be searched."

"The judge or commissioner must, before issuing the warrant, examine on oath the complainant and any witness he may produce, and require their affidavits or take their deposition in writing and cause them to be subscribed by the parties making them."

"The affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing they exist."

"If the judge or commissioner is thereupon satisfied of the existence of the grounds of the application or that there is probable cause to believe their existence, he must issue a search warrant, signed by him with his name of office to a civil officer of the United States duly authorized to enforce or assist in enforcing any law thereof, or to a person so duly authorized by the President of the United States, stating the particular grounds or probable cause of its issue and the names of the persons whose affi-

davits have been taken in support thereof, and commanding him forthwith to search the person or place named for the property specified and to bring it before the judge or commissioner."

It is unnecessary to cite authorities to the effect that evidence procured by virtue of a search warrant which was procured other than as prescribed by said Constitution and statutory provisions cannot be made the foundation of a conviction in a criminal case. Numerous authorities referred to in the course of this brief are to that effect.

ONE

THE SEARCH WARRANT IN QUESTION AND EVIDENCE UPON WHICH IT WAS BASED DID NOT DESCRIBE THE PLACE TO BE SEARCHED WITH THE REQUIRED PARTICULARITY.

The search warrant in question did not describe the place to be searched as either owned or occupied by the defendant. The only description given is in the following language:

> "A ranch with small building used for residence located about 5 miles in a westerly direction from the town of Silver Bow, Montana."

The court will notice judicially the fact that the vicinity of Silver Bow, Montana, is a ranch country

> Sligh vs. Kirkwood, 237 U. S. 52;
>
> Laughter vs. McLain, 229 Fed. 280;

and many ranches could no doubt be found within a dis-

tance of about 5 miles in a westerly direction from said place. The affidavit for search warrant and complaint and application for search warrant were also in like manner indefinite. (T. 39, lines 3 to 5; 40, lines 29 to 31.)

The statute referred to declares that the search warrant shall not be issued but on affidavit particularly describing the place to be searched.

In

United States vs. Alexander, 278 Fed. 308,

a search warrant which commanded the officers to search the premises at "corner of Davidson and Ashleigh Streets, Jacksonville, Florida, being the premises of Jim Alexander," was held to be invalid because the premises were not particularly described, it being pointed out that at the intersection of Davidson and Ashleigh Streets, there were 4 corners, any one of which might be searched under the description furnished.

In

United States vs. Rykowski, 267 Fed. 866,

the description given in the affidavit in support of the application for search warrant and in the search warrant itself was the "premises of William Kozlar, 123 Garfield Street, in Dayton, Ohio." It appeared that there was both a North and South Garfield Street in the place referred to. It was held that the warrant was invalid because it did not contain a particular description of the place to be searched.

In

United States vs. Innelli, 286 Fed. 731,

the premises to be searched were described by street and number and the premises in question were composed of several floors, only one of which was occupied by the defendant and it was held that the warrant was invalid because of insufficient description. In passing upon the question the Court said:

> "If the place described by street and number is used by different persons for different purposes, then it is not a place; but there are several places included in the one description and it is then a general but not a particular description."

TWO.

THE APPLICATION FOR THE SEARCH WARRANT MUST BE BASED UPON COMPETENT EVIDENCE AND THE OFFICER ISSUING THE SEARCH WARRANT MUST HIMSELF HEAR THE TESTIMONY UPON WHICH THE APPLICATION IS FOUNDED.

In

Siden vs. United States, 9 Fed. (2d) 241,

the complaint upon which a search warrant was issued was verified by a Mr. Benson, before the Commissioner who issued the warrant. It was made upon information and belief and had annexed to it an affidavit made positively by one Herman Miller, to a purchase of intoxicating liquor. The search warrant was held to be invalid and a judgment of conviction was reversed.

The principle involved in the decision last referred to was also recognized in the following cases:

United States vs. Kelih, 272 Fed. 484;

Queck vs. Hawker, 282 Fed. 942;

Veeder vs. United States, 252 Fed. 414;

Giles vs. United States, 284 Fed. 208;

and in

People vs. Perrin, 193 NW. 888;

People vs. Woodhouse, 194 NW. 545;

and

People vs. Fons, 194 NW. 543;

the supporting affidavit was not made before the officer who issued the warrant, and so was held not entitled to be considered.

In

Giles vs. United States, Supra,

the law was stated in the following language:

"A commissioner having presented to him affidavits or evidence of the violation of a criminal statute, accompanied by a request for a search warrant, in considering such evidence, acts in a judicial capacity and should issue such warrant only upon competent evidence such as would be admissible upon the trial of a case before a jury. The finding of probable

cause for the issuance of a search warrant is one exclusively for the court or commissioner having the matter in charge."

In

People vs. Fons, Supra,

the law applicable was stated in the following language:

"The question is whether the affidavit, not having been taken before the magistrate can be used for such purpose. We think it can not. In determining probable cause, the magistrate is called upon to perform a judicial act: He must have before him for examination the witness who claims to have personal knowledge of the facts. The affidavit which is required to be taken before him in writing is the result of his examination; it is an important and necessary record of the legal evidence upon which he acts in determining probable cause for the issuance of a search warrant. The warrant does not issue from the mere fact of the filing of an affidavit, but from the finding of a good cause based on legal evidence. The law contemplates a showing before a magistrate, such a showing as satisfies him that a crime has been committed. As there was no such showing in this case, the validity of the search warrant cannot be sustained."

The law is also stated in

Cornelius on Search and Seizure, 277,

as follows:

"But where the showing of probable cause is made

by the affiant based on information and belief induced by another affidavit positive in form, but not sworn to before the magistrate who issued the search warrant, the same is insufficient."

THREE.

IF THE AFFIDAVIT OF JAMES J. MALONEY WAS NOT OBJECTIONABLE OTHERWISE, IT WOULD BE INSUFFICIENT BECAUSE OF THE REMOTENESS IN TIME OF THE FACTS ALLEGED.

Maloney in his affidavit states that on September 22nd, 1928, he bought a pint of whiskey from the defendant and the search warrant in question was issued on the 25th day of October, 1928. If the statements of the affidavit were taken as true, and if there had been, in fact, a pint of whiskey sold on September 22nd, 1928, that was no evidence that there was whiskey in the same premises on the 25th day of October following.

In

Siden vs. United States, Supra,

in passing upon a similar question, the Court said in the opinion:

"Nor did the isolated fact that Mr. Miller bought three drinks of moonshine whiskey from the defendant at the clothing store on November 19th, 1922, establish probable cause to believe that on December 1st, 1922, the defendant was unlawfully in pos-

session of intoxicating liquor at that place, and his affidavit states no other facts tending to establish such probable cause."

In

People vs. Mushlock, 198 N. W. 203,

the affidavit as to the purchase of liquor three weeks previous to the date upon which the search warrant was issued was held to be so far remote as not to show probable cause. In delivering the opinion in the case, the Court said:

> "There is no hard and fast rule as to how much time may intervene between obtaining the facts and the making of the affidavit upon which the search warrant is based, but it may be stated that the time should not be remote. This question was considered in the opinion filed March 5, 1924, in the case of the People vs. Chippewa Circuit Judge (Mich.), 197 NW. 539. We think that case is controlling of the instant case and that the search warrant was improvidently issued."

For the several reasons assigned, all of the evidence upon which a conviction was had upon the 2nd, 3rd, 4th and 5th counts of the information was not properly receivable by the Court and should have been excluded. There was, therefore, no evidence to support the judgment of conviction as to the said four counts of the information.

By said judgment, sentence was imposed jointly upon the conviction of the 1st and 2nd counts of the said in-

formation and as there should have been no conviction upon said 2nd count, the entire judgment should be reversed.

The propositions of law for which we have contended are supported by an unbroken line of authorities. There can be no doubt about what the law applicable to the case is. There is no ptetense that there had been any consent on the part of the defendant to search his premises or that there was any waiver on his part as to his Constitutional rights.

The authorities to which we have referred contain expression of opinion of the Judiciary generally, throughout the country, respecting the evils which will arise through unlawful search and seizure. The salient features of the present case emphasize in a very striking way the tendency to disregard the Constitutional restrictions with respect to the search of the private property of an individual and to disregard also the statutes which have put into statutory form what would otherwise exist in the shape of judicial constructions of the said provisions of the Constitution.

Appellant respectfully submits that the judgment of conviction appealed from should be reversed.

Respectfully submitted,

WILLIAM N. WAUGH,
Attorney for Appellant.

No. 5742

United States Circuit Court of Appeals

For the Ninth Circuit.

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

WELLINGTON D. RANKIN,
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HOWARD A. JOHNSON,
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ARTHUR P. ACHER,
Assistant United States Attorney

Attorneys for Appellee.

Filed, ...1929.

....Clerk.

FILED
MAY
PAUL P. O'BRIEN,
CLERK

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No. 5742

United States Circuit Court of Appeals

For the Ninth Circuit.

PAUL FALL,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

STATEMENT OF THE CASE

This is an appeal from a judgment on conviction of defendant charged in five counts of an information with sale, manufacture, possession of property designed for the manufacture and possession of intoxicating liquor, and maintaining a common nuisance.

By agreement of parties, a jury having been waived, the cause was tried to the Court. (Tr. 6.)

It appears from the testimony that Federal Prohibition Agents F. S. Chase and James J. Maloney went to

a ranch south-west of Silver Bow, Montana, on February 22nd, 1928, and bargained with the defendant Paul Fall for forty gallons of moonshine whiskey, at $5.50 a gallon, and made a deposit of $5.00 on the same, taking a sample of one pint, and also each drank one drink of whiskey in the house. (Tr. 25-27.) Maloney testified that the defendant Fall said, "That he did not have the whiskey there and that he would have to get it from the cache, and for us to come back the next day." (Tr. 27.)

Defendant Fall, testifying in his own behalf, admitted that he had given the Agents a drink of whiskey and had bargained with them for the sale to them of thirty-five or forty gallons of whiskey. He states that the pint of whiskey was given to the Agents upon the representation that someone was sick, and that when the Agents left, a five-dollar bill was found on the wash-stand in the house. (Tr. 30-34.) Defendant's wife testified to substantially the same effect. (Tr. 34-36.) The Agents denied that any representation had been made that either of them was sick. (Tr. 37-38.)

Agent Maloney thereafter appeared before J. H. Brass, United States Commissioner, and made affidavit to the effect that on September 22nd, 1928, he bought one pint of moonshine whiskey from Paul Fall, who was in charge of a ranch with a small building, used for a residence, about five miles in a westerly direction from the town of Silver Bow, State of Montana, and that said Paul Fall was keeping a quantity of intoxicating liquor about the premises, and that Paul Fall bears the reputation of being a person who keeps and sells intoxicating liquors unlawfully, and that said place bears a reputation of being

a place where intoxicating liquors are sold. (Tr. 40-41.)

This affidavit was presented to L. M. Van Etten, U. S. Commissioner, by Ben Holter, together with his complaint on oath and thereupon the warrant was issued. (Tr. 42-45.)

Prohibition Agent Holter, with others, served the warrant on the same day, and searched the defendant's premises, and he testified, "We first searched the house, a one-room frame, and we found some whiskey in there and took samples of it. There was only a small quantity in a keg. We then searched the dugout, some little distance from the house, and found there two stills set up complete. One a forty-five gallon, and one a sixty gallon; about six hundred gallons of mash, two three-hundred gallon vats, some kegs, burners, and pressure tanks complete, and about thirteen gallons of moonshine whiskey." (Tr. 28)

ARGUMENT

The Judgment on Count One Must Be Sustained

The judgment on conviction under count one of the information for unlawful sale of intoxicating liquor must be sustained notwithstanding a joint sentence was imposed under count one and two (which charges unlawful manufacture) even if the evidence supporting count two were suppressed.

Appellant contends that the search warrant is bad, the search illegal, and,

> "That as a consequence there could have been no conviction upon either of counts 2, 3, 4 or 5 of the

information *and as a consequence also the sentence pronounced jointly upon counts* 1 *and* 2 *of the information is erroneous and must be reversed.*" (Brief, p. 8)

There is no contention that the conviction on the first count was erroneous or the evidence insufficient, but simply the assertion that since the first count charges sale of intoxicating liquor on September 22, 1928, while the second count charges manufacture of intoxicating liquor on October 25th, 1928, if the evidence were suppressed supporting the conviction for manufacture, then the judgment must also be reversed as to the conviction for sale.

No authority is cited in support of this proposition, and we submit that it is not the law.

In this case a single sentence of four months was imposed on counts one and two of the information. (Tr. 7.)

The National Prohibition Act provides for the following punishment for unlawful manufacture and sale of intoxicating liquor.

> "Any person who manufactures or sells liquor in violation of this chapter shall for a first offense be fined not more than $1,000 or imprisoned not exceeding six months." * * * 27 U. S. C. A. 46.

We respectfully submit that since the sentence imposed for the two counts does not exceed the punishment which could have been imposed on count one alone, the sentence under count one must be sustained though the evidence supporting count two were suppressed.

In Claassen v. United States, 142 U. S. 140 at 146 it is said:

"In criminal cases, the general rule, as stated by Lord Mansfield before the Declaration of Independence, is 'that if there is any one count to support the verdict, it shall stand good, notwithstanding all the rest are bad.' Peake v. Oldham, Cowper, 275, 276; Rex v. Benfield, 2 Bur. 980, 985. See also Grant v. Astle, 2 Doug. 722, 730. And it is settled law in this court, and in this country generally, that in any criminal case a general verdict and judgment, on an indictment or information containing several counts cannot be reversed on error, if any one of the counts is good and warrants the judgment, because, in the absence of anything in the record to show the contrary, the presumption of law is that the court awarded sentence on the good count only. Locke v. United States, 7 Cranch, 339, 344; Clifton v. United States, 4 How. 242, 250; Snyder v. United States, 112 U. S. 216; Bond v. Dustin, 112 U. S. 604, 609; 1 Bishop Crim. Pro. Section 1015; Wharton Crim. Pl. & Pract. Sec. 771."

And in Kuehn v. United States (9th Cir.) 8 F. (2d) 265 this court said:

"Where conviction is had upon more than one count, the sentence, if it does not exceed that which might be imposed on one count, is good if that count is sufficient."

The same rule is applicable where the evidence is insufficient to support one of the counts as would be the case herein if the search warrant were held invalid. Thus, in Gee Woe v. United States (5th Cir.) 250 Fed. 428, the court said:

"The plaintiff in error also contends that the

evidence did not warrant a conviction upon the third count, which charged him with being a dealer, and not having registered, and paid the special tax, and being in possession of the three tins of opium. *As the sentence was within the competency of the District Court to impose for the offense charged in the first count, it would be referred to that count, if the third count were held to be unsupported by the proof.* (Italics ours.)

There Was Probable Cause to Issue a Search Warrant

The fact that Maloney's affidavit was not sworn to before the commissioner who issued the warrant does not render it defective.

Appellant contends that the search warrant was improperly issued because the supporting affidavit of James J Maloney (Tr. p. 40-41) was not subscribed and sworn to before L. M. Van Etten, the Commissioner who issued the warrant.

An examination of the Federal cases cited does not indicate that such is the law in the Federal Courts.

It is true that People v. Fons (Mich.) 194 N. W. 543 is contra but no precedents are cited as authority in that case and the case has not been cited in support of this proposition in any other jurisdiction so far as we have found.

This affidavit was presented to L. M. Van Etten on October 25th, 1928, by Federal Prohibition Agent Ben Holter, together with a complaint, in which he stated on oath, "That he has just and probable cause to believe and does believe, that intoxicating liquor is now unlawfully manufactured, kept for sale, and sold" on the de-

fendant's premises; that his reasons for his belief are that "he has been heretofore informed that intoxicating liquor is unlawfully manufactured, kept for sale and sold" on defendant's premises, and that "applicant has procured an affidavit from James J. Maloney, setting forth that on the 22nd day of September, 1928, he, the said James J. Maloney, was within said premises and purchased one pint of moonshine whiskey from Paul Fall, for which he paid the sum of $5.00," (Tr. 38-40) and thereupon the warrant was issued. (Tr. 42-45.)

We admit that the sworn complaint of Ben Holter would have been subject to the objections directed against the affidavits in those cases cited by appellant, because based on information and belief. However, when supported by the affidavit of Maloney, positive in form, we submit that as a matter of law there was probable cause to justify the issuance of a search warrant.

There is no question that the commissioner must have probable cause for the issuance of a search warrant supported by oath.

In United States v. Borkowski, 268 Fed. 408 at 410, the Court said:

> "A search warrant may issue only upon probable cause, supported by oath or affirmation. The question of probable cause must be submitted to the committing magistrate, so that he may exercise his judgment as to the sufficiency of the ground for believing the accused person guilty. 25 Am. & Eng. Ency. Law, 147 et seq. The United States commissioner, or any other officer with whom an affidavit is filed, may not, simply because such affidavit is presented,

issue a warrant. The affidavit must itself be sufficient, must state facts which justify the issuance of a warrant and the commissioner or such other officer is required by law to satisfy himself of the sufficiency of the affidavit and that the circumstances call for the issuance of a warrant."

However, we submit that it is not necessary that one making an affidavit positive in form appear in person before the commissioner and we have found no case in the Federal Courts which so holds, altho several cases have facts similar to the case at bar.

In Hurley v. United States, 300 Fed. 75 at 76, the facts were similar to those in the instant case. The Court said:

> "We find no merit in the contention that the commissioner acted in an authorized manner in finding probable cause for issuing a warrant. It was applied for by a prohibition agent, *accompanied by the affidavit of a police officer in the city of Worcester.* * * * *The affidavits filed with the commissioner fully met the requirements of the statutes and the facts disclosed in them were sufficient to authorize the commissioner to find probable cause."* (Italics ours.)

In Gerahty v. United States (4th Cir.) 29 F. (2d) 8 the court apparently approved the practice here followed:

> "The search warrant was issued upon affidavit alleging a sale, and was supported by the affidavit of a prohibition enforcement officer." * * * *
>
> "The two affidavits upon which the warrant was issued were clearly sufficient."

Also see Levee v. United States, 29 F. (2d) 187.

In United States v. Kips Bay Brewing & Malting Co. (2nd Cir.) 29 F. (2d) 837, it was held that though certificate of government's chemist as to alcoholic content was not verified it was sufficient to support affidavit for search warrant.

The case of Hawker v. Queck (3rd Cir) 1 F. (2d) 77 is identical with the case at bar. There a prohibition agent appeared before the United States Commissioner and made an affidavit alleging "That he has good reason to believe that in and upon the premises of Harry P. Queck, at 705 Amity Street, in the borough of Homestead, Pennsylvania, there has been and is now located and concealed a large amount of intoxicating liquor and that the information obtained by your affiant in relation to the sale of liquor by the said Harry P. Queck on the 26th day of June A. D. 1920, was obtained from affidavits made by William McClelland and Nelson Gibson." The affidavits of McClelland and Gibson were sworn to before a notary public two weeks or more before the search warrant was issued. The Court said:

> "Do the affidavits in question show probable cause? We are of opinion they do. Two men had lately visited the hotel of Queck, had each bought and paid for whiskey, and had each brought away separate samples, which they preserved. The premises were described, the street number given, and the date and hour of purchase specified. These were facts, not inferences, and showed probable cause for the issue of a search warrant, and in view of them we think the petitioner failed to show the search of

Queck's premises and the taking of the liquor found upon them was an unreasonable search and seizure." * * * * "We may further state that, while it was suggested at the argument that there was nothing to show that the affidavits of McClelland and Gibson were produced before the commissioner, we may add that, apart from the affidavits themselves being in the printed record, and the reference to them, both in the affidavit of Connor taken before the commissioner and in the warrant itself, the court at bar inquired of counsel as to the facts, and later on was furnished with information that Gibson's and McClelland's affidavits had been before the commissioner when he issued the warrant, and before the court when it passed on its legality."

"Being of opinion, then that the record papers before the commissioner and the court showed probable cause for the issue of the warrant, the decree below, holding it invalid, is reversed and the cause is remanded, with directions to dismiss the petition." 1 F. (2d) 77 at 80.

This court approved Hawker v. Queck, supra, in Nordelli v. United States (9th Cir) 24 F. (2d) 665, saying:

"In Hawker v. Queck (C. C. A.) 1 F. (2d) 77, it was held that an affidavit by a prohibition agent that he had good reason to believe and did believe that on premises designated liquor would be found, and that his information was obtained from affidavits made by named persons, which were before the magistrate and which showed the purchase of whiskey, was held sufficient to show the existence of probable cause to legalize a warrant. Certiorari was denied. 266 U. S. 621, 45 S. Ct. 99, 69 L. Ed.

472."

The cases cited by appellant are not authority for the proposition that the failure of one making a positive affidavit to personally appear before the commissioner vitiates a search warrant issued thereon. On the contrary, in each of these cases the court was considering the sufficiency of the averments in the affidavit.

Thus in Siden v. United States, 9 F. (2d) 241, the *affidavit* was *insufficient* and the court said:

> "Without a statement in those affidavits, depositions, or testimony of facts sufficient to sustain such a conclusion, the search warrant may not lawfully issue. The statement of the sustaining facts showing probable cause is as indispensable to the lawful issue of a search warrant as the legal conclusion that such cause exists. When the facts on which the magistrate's conclusion of probable cause is based are not stated in the affidavits, depositions, or testimony on which the conclusion rests, the warrant cannot be sustained, because there is no criterion by which a court can determine whether or not there were facts showing probable cause, and the unavoidable legal conclusion is that there were not." * * * * "The belief of Mr. Benson that he had reason to believe and did believe that liquor was being sold by the defendant was not a fact showing probable cause for a magistrate to find or adjudge that he was so doing. It was only a thought or guess of Mr. Benson."

In United States v. Kelih, 272 Fed. 484 the affidavit stated "affiant has reason to believe that there are illegally manufactured liquors and an illicit still now concealed in or on said premises". The court said:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath —not suspicions, *belief or surmise.*" (Italics ours.)

In Veeder v. United States, 252 Fed. 414 the affidavit was held insufficient which stated in effect "affiant has good reason to believe and does believe" etc.

In Giles v. United States, 284 Fed. 208 the affidavit said in effect "the law is being violated by the illegal possession of intoxicating liquor" which was held insufficient.

To the above cases may be added many other cases in which the courts hold that affidavits based on a mere belief are insufficient but in *none* of them is it said that an affidavit, positive in form, would be insufficient simply because not subscribed and sworn to before the commissioner issuing the warrant.

The cases rather indicate that *the sufficiency of the averments* of the affidavit are the matter in issue—not whether or not the affidavit must be disregarded in the absence of the deposing party before the commissioner.

Thus, in Lochnane v. United States (9th Cir) 2 F. (2d) 427 this court said:

> "It is fundamental that * * * before a judicial officer is authorized to issue a search warrant *he must have before him, by affidavit or deposition,* the facts tending to establish the grounds of the application, or probable cause for believing that the facts exist." (Italics ours.)

We submit that since in the instant case the commissioner was presented with an affidavit, positive in

form, showing a sale of liquor on the premises there was as a matter of law probable cause for the issuance of a search warrant.

The Description is Sufficient

The description of the premises in the search warrant was sufficiently particular.

The description as set forth in the search warrant is:

> "A ranch with small building used for residence, located about 5 miles in a westerly direction from the town of Silver Bow, Montana." (Tr. p. 43.)

The rule for determining whether the description of the premises is sufficient is declared in Steele v. United States, No. 1 267 U. S. 498 at 503 where it is said:

> "It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended. Rothlisberger v. United States, 289 Fed. 72; United States v. Borkowski 268 Fed. 408, 411; Commonwealth v. Dana, 2 Metc. 329, 336; Metcalf v. Weed, 66 N. H. 176; Rose v. State, 171 Ind. 662; McSherry v. Heimer, 132 Minn, 260."

We submit that the description is sufficiently particular in the instant case upon the record before the court. There is nothing in the record to indicate that there is any other ranch located "about 5 miles in a westerly direction from the town of Silver Bow, Montana." Counsel for appellant has injected into his brief the statement:

> "Many ranches could *no doubt* be found within

> a distance of about five miles in a westerly direction from said place." (Brief p. 10.)

but the record does not support this assertion, and while it is true in Laugter v. McLain, 229 Fed. 280, a District Court held that judicial notice would be taken "that there are school houses 4 miles from Memphis" by the same sign the District Court in the instant case may have taken judicial notice that there were no other ranches that could fit the description in the search warrant herein.

The defendant testified:

> "My name is Paul Fall. I am a rancher, and I live on a ranch near Silver Bow Junction, in Silver Bow County, Montana, and I have lived there for the last past fifteen years. My wife and family live with me in my residence, located on said ranch and we have a small dwelling house." (Tr. p. 30-31.)

In Metcalf v. Weed, 66 N. H. 176 cited by the Supreme Court in the Steele case supra, the court said:

> "The description of the place as 'the premises now occupied by Parker Metcalf situated in Haverhill' is not upon its face insufficient. *It is a question of fact, determinable at the trial term, whether it designates the place with reasonable certainty.*" (Italics ours.)

Since there is no evidence in this case that there is any other ranch that fits the description it follows that the description is sufficient in this case.

It is true that if a description is such as would permit the officers to search a number of places, the description is not particular. An example of such a situation

is disclosed in U. S. v. 2615 Barrels, more or less, of Beer, 1 F. (2d) 500 at 502, where the court said:

> "The further consideration presents itself that the premises directed to be searched, * * * is, * * found to consist of * * * not only the three-story brick building occupied for brewery purposes, but also one one-story grocery and meat store, one double brick dwelling house, and five frame dwelling houses, all of said buildings and houses being occupied solely by private families exclusively from the brewery, and are the property of others * * * * *." * * "If the place described by street and number is used by a number of persons for different purposes, then it is not a place; but there are several places included in the one description. * * * It is then a general but not a particular description."

But in this case there is no evidence that such was the case, and the situation is similar to that in Rothlesberger v. United States (6th Cir) 289 Fed. 72 where the search warrant gave an erroneous street number reciting a certain building number 123 occupied by the Rothlesberger family, when in fact the number was 121 and the court held the description sufficient saying *"There is nothing to show that there was any building No.* 123 *or any room for doubt as to the house intended."* (Italics ours.)

Furthermore a farm need not be described with the particularity of a city residence. Thus in State v. Stough (Mo.) 2 S. W. (2d) 767, the description was:

> "In a certain dwelling house and the premises thereof, and the outbuildings located upon said premis-

es situate about 5 miles west of Rolla, in Phelps County, Mo., said dwelling house being occupied by Aso Stough and his family as their residence."

The Court said:

"It seems neither necessary or practical to describe a farm dwelling in a search warrant with the same degree of particularity as a dwelling house located in a city, town or village, where different families live in the same house and in adjoining houses and where houses may be definitely described by street numbers or by other marks of identification. Considering the location of appellant's dwelling house, it is our conclusion that the description of the same in the search warrant in question is sufficient to meet the requirements of the constitution and the statute as contemplated by the powers thereof."

And in United States v. Borkowski, 268 Fed. 408, 411 the Court said:

"In describing the place to be searched, it is sufficient if the officer to whom the warrant is directed is enabled to locate the same definitely and with certainty. This does not necessarily require the exact legal description to be given, such as ordinarily appears in deeds of record in the county recorder's office. The description may be such as is known to the people and used in the locality in question, and by inquiry the officer may be as clearly guided to the place intended as if the legal record description were used."

In United States v. Nadeau (D. C.) 2 F. (2d) 148 quoting from syllabus:

> "Affidavit describing premises to be searched as 'second house on north side of Duvall-Monroe highway and west from highway bridge over Skykomish river in Snohomish county, state of Washington,' used and occupied by parties previously described, *held* to sufficiently identify the premises, in absence of particular description."

In Bradley v. State (Miss.) 98 So. 458 the description was "a certain room or building and all out houses occupied by James or Zeko Bradley, situated in Forrest County, Miss." The Court held the description sufficient, saying:

> "We think the warrant and the affidavit sufficiently describe the premises to be searched. There is some difference among the authorities as to what is a sufficient description of the premises to be searched, and some of the courts have held that the description must be as specific as a description in a conveyance of real estate. Others have held that any description that will enable the officer to locate the premises definitely and with certainty is sufficient, and we think this view is the better one. A description may be one used in the locality and known to the people, if it is sufficiently suggestive that an officer by reasonable inquiry may locate with certainty the place to be searched."

In People v. Lienartowicz (Mich.) 196 N. W. 326 a description in effect—"The dwelling of William Lienartowicz in the city of Gaylord, county of Otsego, state of Michigan" was held sufficient.

In State v. Whitecotten (W. Va.) 133 S. E. 106 a description "that certain farm and dwelling house and

all outbuildings on said farm, said farm is located in Sand Hill District, and known as Thomas J. Earlimine farm, in Marshall County, W. Va.'' was held sufficiently particular.

In Buis v. Commonwealth (Ky.) 266 S. W. 895, the description was:

> ''The house now used and occupied by Oscar Buis as a residence, buildings and premises adjacent thereto. Said residence situated in Cosey County, near Humphrey, Ky.''

The Court said:

> ''Cosey County is a farming district, and has but few towns. The location of Humphrey, Ky., in that county is well known. When the officer to whom the warrant was issued received it, he at once knew where the residence of Oscar Buis was located; or if he did not know the exact building, he had all the information he should have in order to find the residence of Oscar Buis.''

However, counsel calls attention to the fact that the description does not describe the place to be searched as owned or occupied by the defendant. (Brief p. 10.) However, as was said in United States v. Camarota 278 Fed. 388:

> ''It is not necessary that the search warrant name a particular person; the name of the place to be searched is sufficient.''

And in Petition of Barber, 281 Fed. 550 at 554, it is said:

> "As it is not claimed that any person was to be searched under this warrant, or in fact was searched, it was, of course, unnecessary to name or describe any person. * * *"

Also see Barrett v. United States (6th Cir) 4 F. (2d) 317, and United States v. Callahan, 17 F. (2d) 937.

The Affidavit Was Sufficient to Show Probable Cause

The affidavit upon which the warrant was issued is not too remote to show probable cause for the issuance of the warrant.

In Giles v. United States (1st Cir.) 284 Fed. 208 at 214, the Court adopted the following language of the trial court:

> "The finding of probable cause for the issuance of a search warrant is one exclusively for the court or comissioner having the matter in charge."

In United States v. McKay 2 F. (2d) 257 the rule with reference to time is stated:

> "In Section 11, title 11, of the Espionage Act (Sec. 10496¼k), it is provided that 'a search warrant must be executed and returned to the judge or commissioner who issued it within 10 days after its date; after the expiration of this time the warrant, unless executed, is void.' *The absence of such limitation as to the lapse of time between the purchase of liquor and the making of an affidavit indicates that in the opinion of the Congress this was a matter which should be left to the discretion of the judge or commissioner,* who determines whether there is or

is not probable cause . There can be no hard and fast rule fixed by courts to fit every such situation, under all circumstances. Each case must depend upon its own facts. The person or persons who are charged with having whiskey in their possession, the quantity of liquor, and the place where it is kept, may all be taken into account, as well as the alleged sale, and the lapse of time.

Obviously contraband goods are more likely to remain for some time if stored by their owner, a substantial citizen, in his own ware house on the outskirts of a city, than if concealed in a cabin by an unknown stranger.'' * * * * * ''It was for the commissioner to determine whether the showing was sufficient to establish probable cause for believing that intoxicating liquors still were on the premises, and that such premises were still being used for the unlawful sale of liquor December 14th, when the search warrant was placed in the hands of the officers.'' * * ''Furthermore, when the affidavit was signed and sworn to before the commissioner, it became her duty to weigh the evidence to ascertain whether it established probable cause for issuance of the warrant. This she did, and in so doing exercised a judicial function. The affidavit disclosed facts which, if true, were ample to support a search warrant.'' (Italics ours.)

Appellant cites Siden v. United States (8th Cir.) 9 F. (2d) 241, but in that case it will be noted that the court said:

''If the affidavits on which the search warrant was based had disclosed the fact that this clothing store was a place where substantial quantities of

intoxicating liquors apparently for sale were kept, or a place where a saloon or place of sale of intoxicants had been or was maintained, and where several sales had been made by the defendant, the commissioner's finding of probable cause might possibly have been sustained."

In this case, the affidavit discloses a sale of one pint of whiskey by defendant to Malony, that the defendant was "keeping stored in and about said premises a quantity of intoxicating liquor"; that the defendant "bears the reputation of being a person who keeps for sale and sells intoxicating liquors"; and that "said place bears the reputation of being a place where intoxicating liquors are unlawfully sold."

So we submit that the evidence before the Commissioner was sufficient to justify the issuance of the warrant at this time. When it appears from the affidavit that the violation is on ranch premises, and that large quantities are stored on the premises, it would seem reasonable to believe that the contraband goods are likely to remain there for some time, and that the violation is more likely to be continuous than in a case where one purchases a drink of whiskey "within a clothing store and nothing is said about the character of the store", as in the Siden case, supra.

And as was said in People v. Halton (Ill.) 158 N. E. 134:

"The fact that plaintiff in error had sold intoxicating liquor to the affiant constituted just and proximate cause to believe that he would continue to do so for a short period thereafter; and the affiant was

not required to go to the house of plaintiff in error repeatedly to ascertain whether he had ceased to make such sales.''

''Objection is also made that the complaint and affidavit supporting the search warrant disclosed only a single sale of a pint of liquor, and that for that reason was void. The sale of a small quantity of intoxicating liquor at a given time in violation of the National Prohibition Act cannot be made with impunity: a person need not have knowledge of repeated sales, or of sales of large quantities of liquor before he is qualified to make a complaint and affidavit upon which a search warrant may be issued.''

Having a positive affidavit of unlawful sale on the premises together with positive statements that large quantities of intoxicating liquors were stored on the premises and that the place had a reputation of being a place where intoxicating liquors were sold, together with a sworn complaint of Ben Holter, we submit that as a matter of law there was probable cause for the issuance of the search warrant, at the time the application was made on October 25th, 1928.

For the foregoing reasons we respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

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No. 5743

United States

Circuit Court of Appeals

For the Ninth Circuit.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS,

Appellants,

vs.

Le SAGE & COMPANY, INC., a corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Southern District of California, Southern Division.

FILED
FEB 28 1929
PAUL P. O'BRIEN,
CLERK

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original record are printed literally in italic; and, likewise, cancelled matter appearing in the original record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

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UNITED STATES OF AMERICA, SS.

To LeSAGE & COMPANY, INC., a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 4th day of November, A. D. 1928, pursuant to Notice of Appeal in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain suit in equity wherein JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS, are Plaintiffs, and you are Defendant to show cause, if any there be, why the Final Decree entered July 6th, 1928, in the said cause mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable Wm. P. James, United States District Judge for the Southern District of California, this 5th day of October, A. D. 1928, and of the Independence of the United States, the one hundred and fifty-third.

Wm P James
U. S. District Judge for the
Southern District of California

[Endorsed]: No. M-27-M. United States District Court, Southern District of California, Southern Division. James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks, plaintiffs vs. LeSage & Company, Inc. a corporation, defendant. Citation. Due service and receipt of a copy of the within Citation is hereby admitted this 6th

day of October, 1928 Clarke & Bowker, atty for .... Filed Oct. 8, 1928. R. S. Zimmerman. R. S. Zimmerman Clerk. Lyon & Lyon, Frederick S. Lyon, Leonard S. Lyon, National City Bank Building, Los Angeles, Cal.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS, Plaintiffs,	
vs.	IN EQUITY NO. M 27 M
LeSAGE & COMPANY, INC., a corporation, Defendant.	

BILL OF COMPLAINT FOR INJUNCTION AND ACCOUNTING FOR INFRINGEMENT OF U. S. LETTERS PATENT 1,475,306.

Come now plaintiffs above-named and, complaining of defendant above-named, allege:

I.

That plaintiffs, James W. McGhee and Edward C. Jinks, during all of the times hereinafter mentioned, are citizens and residents of the City of Los Angeles, County of Los Angeles, State of California, within the Southern Division of the Southern District of California, trading under the

firm name of McGhee & Jinks; that the defendant, LeSage & Company, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of Los Angeles, California, within the Southern Division of the Southern District of California.

II.

That the ground upon which this Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

III.

That heretofore, to-wit, prior to September 23, 1922, plaintiff James W. McGhee, of Los Angeles, California, was the original, first and sole inventor of a new and useful invention, to-wit, Drapery Hook, not known or used by others before his invention or discovery thereof, or patented or described in any printed publication in the United States of America or in any foreign country, before his invention or discovery thereof, or more than two (2) years prior to his application for letters patent thereon in the United States of America, or in public use or on sale in the United States of America for more than two (2) years prior to such application for letters patent therefor, and not abandoned; that heretofore, to-wit, on the 23rd day of September, 1922, the said James W. McGhee made application in writing in due form of law to the Commissioner of Patents of the United States of America for letters patent for said invention, which application was then duly filed in the United States Patent Office and the Government fees therefor duly paid, and said James W. McGhee complied in all respects with the conditions and requirements of said law; that by an instrument in writing

executed in his name by said James W. McGhee and duly delivered to plaintiff Edward C. Jinks, said James W. McGhee did sell, assign, transfer and set over unto said plaintiff Edward C. Jinks an undivided one-half (½) interest in and to said invention and all rights in and to all letters patent to be granted and issued therefor, and did authorize and request the Commissioner of Patents to issue letters patent in accordance with said written assignment; that said instrument in writing was prior to November 27, 1923, duly recorded in the United States Patent Office, as in and by said original instrument, or a duly certified copy thereof ready in Court to be produced, will more fully and at large appear; that after due proceedings had and due examination made by the Commissioner of Patents as to the novelty and patentability of said invention, heretofore, to-wit, on the 27th day of November, 1923, letters patent of the United States of America No. 1,475,306, signed, sealed and executed in due form of law and bearing the day and year last aforesaid, were granted, issued and delivered by the Commissioner of Patents of the United States of America to plaintiffs, all as more fully and at large will appear from said original letters patent or a duly certified copy thereof ready in Court to be produced, as may be required; that thereby there was granted and secured to plaintiffs, their legal representatives and assigns, for the term of seventeen (17) years from and after the 27th day of November, 1923, the exclusive right and liberty of making, using and vending to others to be used, the said invention throughout the United States of America and the territories thereof; that plaintiffs are now, and at all times from and after the 27th day of November, 1923,

have been the owners and holders of said letters patent and of all rights and privileges thereby granted and secured.

IV.

That said invention is of great value and has gone into extensive use, and plaintiffs have manufactured and sold numerous devices embodying the said invention and the same have been generally adopted and used beneficially by the public at large, and the public at large has recognized the same as a novel, patentable and beneficial invention.

V.

That without the license or consent of plaintiffs, and in violation of the exclusive rights secured to plaintiffs by said letters patent and at divers times since the grant, issuance and delivery of said letters patent to plaintiffs, and for the purpose of competing with plaintiffs and in order to appropriate to themselves the public demand for devices embodying said invention and to divert the trade therein and the profits derivable therefrom from plaintiffs to itself, defendant LeSage & Company, Inc., has, within the City of Los Angeles, State of California, and elsewhere in the United States, caused to be sold and used, and has sold and used, and intends to continue to sell and use, drapery hooks embodying and containing the said invention patented in and by said letters patent, and will continue to do so unless enjoined and restrained by this Court.

VI.

That on the 9th day of March, 1927, the plaintiffs notified defendant in writing of said letters patent and of its infringement thereof; that on the 14th day of March, 1927, defendant, in answer to said notification of infringement, notified plaintiffs that it had ceased infringing said letters

patent by withdrawing the stock of hooks it had on hand from the market and agreed in said letter that it would not further infringe; that notwithstanding said promise and agreement not to further infringe said letters patent, defendant has, since March 14, 1927, infringed said letters patent, and still continues to infringe, and threatens to infringe said letters patent by selling and using drapery hooks embodying and containing the said invention patented in and by said letters patent No. 1,475,306; that thereby defendant has caused plaintiffs great damage, loss and injury, and that defendant has realized great profits, gains and advantages; that plaintiffs do not know exactly to what extent or how many of said devices embodying said drapery hook invention the defendant has sold or used, or caused to be sold or used, or the exact amount of the profits and advantages accrued to the defendant therefrom, and pray full discovery thereof.

WHEREFORE, plaintiffs pray:

(1) For a permanent injunction and a preliminary injunction pending this suit, restraining the defendant, LeSage & Company, Inc., its officers, agents, attorneys, servants, employees and representatives, and each of them, from infringing upon said letters patent.

(a) That the defendant be required to account for and pay over to plaintiffs all such gains and profits as have accrued or arisen or been earned or received by it by reason of its unlawful acts as hereinbefore set forth, and all such gains and profits as would have accrued to the plaintiffs but for the unlawful doings of the defendant aforesaid; also all damages sustained by the plaintiffs by reason of the violation and infringement by defendant of plaintiffs' letters patent as hereinbefore complained of, and that your

Honors will increase the actual damages assessed to a sum equal to three (3) times the amount of said assessment under the circumstances of the unlawful, wilful and unjust infringement by the defendant.

(3) That the defendant may be decreed to pay the costs of this suit.

(4) That the plaintiffs may have such other and further relief as the circumstances of the case may require.

(5) That the defendant be required to answer, but not under oath, oath to the answer of said defendant being hereby expressly waived, and

(6) That a subpoena ad res., and writs of injunction, both pendente lite and permanent, issue to said defendant, LeSage & Company, Inc.

McGHEE & JINKS,
By James W. McGhee
Lyon & Lyon
Henry S. Richmond,
Solicitors for Plaintiffs.

[Endorsed]: No M 27 M United States District Court Southern District of California Southern Division. James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks, Plaintiffs vs LeSage & Company, Inc., a corporation, Defendant. Bill of Complaint for Injunction and accounting for infringement of U. S. Letters Patent No. 1,475,306. Filed Jun 11 1927 R. S. Zimmerman, Clerk By R. S. Zimmerman Lyon & Lyon Frederick S. Lyon Leonard S. Lyon 708 National City Bank Building Los Angeles, Cal. Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks,

Plaintiffs,

vs.

LE SAGE & COMPANY, INC., a corporation,

Defendant.

No. M 27 M Equity.

ANSWER

Now comes the defendant, LE SAGE & COMPANY, INC., and for answer to the bill of complaint avers as follows:

I. Defendant admits that it is a corporation organized and existing under and by virtue of the laws of the State of California, as alleged in paragraph "I" of the bill of complaint, and that it has a principal place of business at Los Angeles, California, within the Southern Division of the Southern District of California, but defendant is not informed, save by said bill of complaint, as to whether plaintiffs are citizens of said City of Los Angeles, trading under the firm name of McGhee & Jinks, and therefore requires such proofs thereof as plaintiffs may be advised.

II. Defendant admits that this is a suit in equity arising under the patent laws of the United States, as alleged in paragraph "II" of the bill of complaint.

III. Defendant admits that Letters Patent of the United States, No. 1,475,306, were granted to plaintiffs on November 27, 1923, but it is without knowledge as to the other allegations contained in paragraph "III" of the bill of complaint, and therefore denies the same.

IV. Defendant denies each and every allegation in paragraph "IV" of the bill of complaint.

V. Referring to paragraph "V" of the bill of complaint, defendant denies each and every allegation in said paragraph contained.

VI. Referring to paragraph "VI" of said bill of complaint, defendant admits that plaintiffs notified defendant in writing of said Letters Patent on or about the ninth day of March, 1927, but it denies each and every other allegation in said paragraph contained.

VII. Defendant further answering avers that said Letters Patent are invalid and void because all material and substantial parts of said alleged invention therein set forth and claimed were described more than two years prior to the application of said James W. McGhee for a patent therefor, or prior to the alleged invention thereof, in the following patents and printed publications:

(a) UNITED STATES LETTERS PATENT.

No. 1,069,999 to Edith B. Ashmore, dated August 12, 1913.

(b) BRITISH PATENTS.

British Patent No. 15,079 of 1910 to Anne Timmis.
" " " 5,780 of 1886 to Henry C. Harrison.
" " " 28,885 of 1912 to French and others.

(c) PUBLICATIONS.

Page 5 of a Manufacturers Catalogue published on or before June 9, 1882 and circulated among the trade and

public both in England and in the United States by James Whitefield & Sons of Birmingham, England.

Page 136 of a Manufacturers Catalogue, published about April 24, 1891, and circulated among the trade and public, both in England and in the United States, by James Whitefield & Sons, of Birmingham, England.

Page 62 of a Manufacturers Catalogue, published in 1895, and circulated among the trade and public, both in England and in the United States, by Tonks, Ltd., of Birmingham, England.

Also other patents and publications not now known to defendant with sufficient accuracy for insertion herein, but which, when ascertained, defendant prays leave to insert herein by amendment.

VIII. Defendant avers that said Letters Patent are invalid because the alleged invention thereof was known to, or used by others in this country before the alleged invention or discovery thereof by said James W. McGhee, to wit: by the patentees of the patents set forth in paragraph "VI" of this answer, their assistants and employees and by H. L. Judd Company, a corporation, of Wallingford, Connecticut, also by various other persons, firms and corporations whose names are not at present known by the defendant with sufficient accuracy for insertion herein, but which, when ascertained, defendant prays leave to insert herewith by amendment.

IX. Defendant avers that said Letters Patent are invalid because the alleged invention thereof had been introduced into public use or placed on sale in this country by various persons or concerns and at various places more than two years prior to the date of the application of James W. McGhee for Letters Patent therefor, to wit:

Edith B. Ashmore at Philadelphia, Pennsylvania, Somerville, New Jersey and elsewhere;

H. L. Judd Company, a corporation at Wallingford, Connecticut, New York, N. Y. and elsewhere, and by various other persons, firms and corporations whose names are at present not known to the defendant with sufficient accuracy for insertion herein, but which, when ascertained, defendant prays leave to insert herein by amendment.

X. Defendant avers that said Letters Patent are invalid because the alleged invention thereof involved no inventive act, in view of the state of the art at the time said invention was alleged to have been made.

WHEREFORE, defendant prays that said bill of complaint may be dismissed with costs to defendant.

Dated, July 28th, 1927.

LE SAGE & COMPANY, INC.,
by
W L LeSage
President.

James E. Neville
Clarke & Bowker
Solicitors for defendant.
Mitchell & Bechert
Of Counsel.

[Endorsed]: Original No. M 27 M Equity. United States District Court, Southern District of California Southern Division. James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks, Plaintiffs, vs. Le Sage & Company, Inc., a corporation, Defendant. Answer Mitchell & Bechert Solicitors for Defendant 420 Lexington Avenue New York, N. Y. Received copy Aug 2- '27 Leonard S Lyon Atty for Plaintiff Filed Aug 2 1927 R. S. Zimmerman, Clerk By Edmund L. Smith Deputy Clerk

At a stated term, to wit: The January Term, A. D. 1928 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Saturday the 23rd day of June in the year of our Lord one thousand nine hundred and twenty-eight

Present:

The Honorable WM. P. JAMES, District Judge.

James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks,
Plaintiffs,

vs. No. M-27-M Eq.

LeSage & Company, Inc., a corporation,
Defendant.

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This cause having been heretofore tried before the Court, evidence having been presented and arguments heard, and the cause having been submitted for decision; and certain objections having been made to the introduction of trade-catalogues and pages therefrom, the Court having first considered such objections in connection with depositions taken in England, which are ordered filed, and said objections are overruled with an exception to plaintiffs; and all matters having been duly considered, the Court finds the device having been marketed by defendant, is substantially that described in the patent of the plaintiffs, but the Court finds that said patent of plaintiff is invalid in that it discloses no invention over devices made and marketed prior to the date of the patent application, and that plaintiffs' device was not new in the art; the Court

does not find that the device of plaintiff was specifically anticipated by such devices so made and marketed at such prior times. Decree is accordingly ordered to be entered in favor of defendant, with costs.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS, Plaintiffs	
vs.	IN EQUITY
Le SAGE & COMPANY, INC., a corporation, Defendant.	NO. M-27-M.

FINAL DECREE

The above entitled suit having come on for trial upon the pleadings and proof produced on behalf of the respective parties, LYON & LYON and HENRY S. RICHMOND, on behalf of Plaintiffs, and GEORGE H. MITCHELL, JAMES E. NEVILLE and RAYMOND IVES BLAKESLEE, Esquires, on behalf of Defendant, and the cause having been argued, and memoranda having been filed on behalf of the respective parties and due consideration having been given in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that the Bill of Complaint be, and the same is, hereby dismissed and that Defendant have judgment against Plaintiffs, and each of them, for the sum of Eighty two and 60/100 dollars, as costs to be taxed by the Clerk of this Court.

Dated at Los Angeles, California, this 6th day of July, 1928.

Wm P. James
District Judge.

Approved as to form provided in Court Rule 44.

Lyon & Lyon
Henry S. Richmond
Solicitors and Counsel for Plaintiffs.

Decree entered and recorded Jul 6- 1928 R. S. Zimmerman, Clerk By Murray E. Wire Deputy Clerk

[Endorsed]: In Equity M-27-M United States District Court Southern District of California Southern Division James W. McGhee and Edward C. Jinks, etc. Plaintiff vs Le Sage & Company, Inc., a corporation Defendant Final Decree Filed Jul 6 1928 R. S. Zimmerman, Clerk By Murray E. Wire Deputy Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

McGHEE & JINKS, Plaintiffs,

vs.

LE SAGE & COMPANY, INC., Defendant.

In Equity No. M-27-M.

STATEMENT OF TESTIMONY UNDER EQUITY RULE 75.

This cause came on for trial on May 3, 1928, at ten o'clock A. M., plaintiffs being represented by Henry S. Richmond and Lyon & Lyon, and defendant being represented by Raymond Ives Blakeslee, and James E. Neville, of Clark & Bowker, and George H. Mitchell, of Mitchell & Bechert.

Letters Patent in suit, No. 1,475,306, were introduced in evidence as Plaintiffs' Exhibit 1.

The assignment of an interest in the patent in suit from James W. McGhee to Edward C. Jinks was introduced in evidence as Plaintiffs' Exhibit 2.

A carton of drapery hooks, marked "one gross, No. 372, brass drapery hooks, made in U. S. A.," was introduced in evidence as Plaintiffs' Exhibit 3-A, and it was stipulated by the defendant that the hooks so introduced in evidence were sold by the defendant. An invoice of LeSage

& Company was introduced in evidence as Plaintiffs' Exhibit 3-B. It was also stipulated by defendant that the invoice was delivered to the purchaser by the defendant at the time the drapery hooks, Plaintiffs' Exhibit 3-A, were sold.

WILFRED L. LeSAGE,

president of the defendant company, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows, upon Direct Examination:

My name is Wilfred L. LeSage. The letter that you show me was written by me and I am familiar with the contents thereof.

(The letter identified by the witness was introduced in evidence as Plaintiffs' Exhibit 4.)

JAMES W. McGHEE,

one of the plaintiffs, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows, upon Direct Examination:

My name is James W. McGhee. I am one of the plaintiffs in this case. My partner is Mr. E. C. Jinks, present here in court. I am engaged in manufacturing drapery hardware, known as the Non-Sew-On drapery hooks, and so forth. The carton of Non-Sew-On drapery hooks shown me are manufactured by McGhee & Jinks. They are made of brass wire. They are manufactured by McGhee & Jinks and sold to the trade. The purpose for which they are sold is to support draperies.

(The carton of Non-Sew-On drapery hooks just identified by the witness was introduced in evidence as Plaintiffs' Exhibit 5.)

(Testimony of James W. McGhee)

I am the inventor or the patentee of patent No. 1,475,306, the letters patent in suit. I have been acquainted with the drapery business since 1900, and in that time I have been acquainted with the kind of drapery hooks commonly sold to the trade. At the time I brought out my patented drapery hook, there was being sold a drapery hook that we used to sew on with needle and thread, requiring thread, needle and labor. I have a sample with me of the hook on a piece of drapery material, sewed on. In comparing the hook that was sewed onto the drapery with the drapery hooks of the patent in suit, I will state in the olden days we had to sew the drapery hooks on as illustrated right here, with thread, which required labor and thread and also time. I conceived the idea of making Non-Sew-On drapery hooks, and this is one of them (exhibiting to the court a drapery hook from Plaintiffs' Exhibit 5). I conceived the idea of making a drapery hook with an arm to go on the outside and to be pointed and to close in against the inside in order to pinch the drapery material, like the bottom of this piece of drapery. That won't fall out of the drapery. When placed in drapery material like this, the material rests on the bottom and is pinched by the hook, and when the hook is ready and the drapery ready for installation they hang on a rod and they are pointed on one end.

We have been manufacturing these Non-Sew-On drapery hooks since the latter part of 1923, and from that time up to the present date we have sold approximately 60,000 gross of these drapery hooks. These drapery hooks have been sold throughout the United States. The Kirsch Manufacturing Company, of Sturgis, Michigan, have taken

(Testimony of John Day)
nearly our output, and they have been sold all over the United States, and I understand some places in foreign countries; I can't say just where. But the Kirsch Manufacturing Company have carried these and advertised them and sold them all over the country.

Upon

Cross-Examination,

Mr. McGhee testified as follows:

The Kirsch Manufacturing Company has not been our sole distributor, but they have handled nearly all our output. I would say 90 per cent or 95 per cent of our output. The Kirsch Manufacturing Company act as jobbers.

"THE COURT: I think we can assume that the device is useful and salable. Now, is there anything else that is important?"

(Plaintiffs rested.)

Defendant introduced the depositions of John Day, R. D. H. Vroom and William H. Edsall.

JOHN DAY,

a witness called on behalf of defendant, being duly sworn, testified as follows, upon

Direct Examination.

My name is John Day. I reside at 509 Center Street, South Orange, New Jersey, and my occupation is manufacturer of hardware. I am connected with the H. L. Judd Company. The H. L. Judd Company are makers of a miscellaneous line of upholstery hardware. My connection at present is president of the company. I have been

(Testimony of John Day)
president since 1900. I have been connected with the company since 1870. I started in business with Mr. Judd when we had one other employee beside myself. My duties were to keep the books, make out the bills, sell the goods, deliver the goods, and do anything else that was to be done around the plant. The factory of the Judd Company is located at Wallingford, Connecticut. It has offices located in Boston, New York and Chicago. It also has a factory at Chattanooga, Tennessee. I am familiar with the manufacture and sale of drapery hooks. My duties during the past year have brought me in contact principally with the sale of various kinds of drapery hooks during the past year. My own office is located at 87 Chambers Street, and I have been in that office a little over fifty years. In other words, the office of H. L. Judd Company has been located in the same building for over fifty years. The brown covered book, having on the outside a large letter "T", that you show me, I am able to identify.

"Q What is that book?

"A Catalogue issued by The Tonks Company of Birmingham, England.

"MR. RICHMOND: Motion is made to strike the answer of the witness on the ground that the witness is not qualified to answer; that the answer of the witness is the conclusion of the witness.

"Q When did you first see that particular volume which you hold in your hand?

"A We have had this book in our possession for many years.

"MR. RICHMOND: Motion is made by counsel for plaintiffs to strike the answer of the witness on the ground that the same is not responsive to the question."

(Testimony of John Day)

It would be impossible for me to say the first particular day that I saw this Tonks catalogue. In 1883 I went over to Birmingham in England and purchased merchandise from the Tonks Company. We continued to buy goods of them for a number of years, and in the course of our business relations with them we received this catalogue. The day we received it I couldn't tell at this time. It has been in our possession more than ten years.

"Q How do you know that you have had this book in your possession for 16 years at least?

"A I know that we ordered goods from that catalogue by mail and used the catalogue in our business in importing merchandise from Tonks & Company.

"MR. RICHMOND: Motion is made to strike the answer on the ground that the same is not responsive and furthermore is the opinion and conclusion of the witness and not based on personal knowledge."

When I state we ordered goods from that catalogue, I mean that the orders were made by my direction. The nature of the business of Tonks, Ltd., of Birmingham, England, is manufacturers of metal goods, and that was the business which they conducted when I visited them in 1883.

"MR. MITCHELL: I offer in evidence the book identified by the witness and ask the Notary to mark the same "Defendant's Exhibit No. A, Catalogue of Tonks, Ltd.'

"MR. RICHMOND: Objection is made to the offer on the grounds that the same has not been properly identified; that the same is not relevant or material; that no proof of its publication has been made and no proof of its circulation. Objection is further made that the offer

(Testimony of John Day)

does not come under the head of 'Publications' set forth in the Revised Statutes."

I recognize the book with the letters "G W" on the outside. In 1881 I went to England and purchased merchandise from George Whitehouse, the publisher of this book. We purchased a great many goods of this firm for many years. I find in this book a letter written by Whitehouse to H. L. Judd Company, soliciting our business and quoting prices on goods illustrated in the catalogue. I saw this book at the time it was received by us. It would come to me, as I was at that time conducting the importation of hardware. The book that I have identified has been in my own possession more than twenty years.

"Q How do you know that that book was published by George Whitehouse?

"MR. RICHMOND: Objection, on the ground that the question is immaterial, irrelevant and incompetent and not the proper method of proof and calls for the opinion and conclusion of the witness.

"A We received the catalogue direct from George Whitehouse with his letter quoting prices on the merchandise represented.

"MR. RICHMOND: Motion made to strike the answer of the witness on the ground that the same is just the opinion and conclusion of the witness."

The letter quoting prices to us is in the book. It is pasted in the book. The letter was in the book when we received it, June 9, 1882.

"MR. RICHMOND: Further objection is made to the letter just testified to by the witness on the ground that the same has not been properly identified; that the same

(Testimony of John Day)
is self-serving; furthermore, that no opportunity was given counsel for plaintiffs to cross-examine the writer thereof. Furthermore, it is the opinion and conclusion of the witness and not founded on fact."

In my last answer I stated that the letter dated June 9, 1882, was pasted in the book which we are discussing, when we received it June 9, 1882, and I make that statement on my own knowledge.

"MR. MITCHELL: I offer the book identified by the witness and ask the Notary to mark the same 'Defendant's Exhibit B, Whitehouse Catalogue (1882).'

"MR. RICHMOND: Objection is made to the introduction of the catalogue marked 'Exhibit B' on the same ground as urged to the offer of Defendant's Exhibit A. Further objection that the same has not been pleaded by defendant in its answer. Further objection to Exhibit B of defendant is urged, now having for the first time seen the so-called letter from George Whitehouse, and objection is made and the court's attention is called that the writing so pasted in the book is not a letter, as it is not signed by anyone."

I recognize the book that you show me as being the Whitefield catalogue. We purchased goods from the Whitefield Company. The Whitefield Company are manufacturers of hardware. We have had the book in our possession for many years.

"Q. When did you first see the book which you are holding in your hand and which you have referred to as a catalogue of the Whitefield Company?

"A I find in the catalogue a date written in the catalogue, '1891'; we have no knowledge as to who wrote that.

(Testimony of John Day)

"MR. RICHMOND: Motion is made to strike the answer on the ground that the same is not responsive to the question.

The book under discussion has been in my possession during the period of time which the Judd Company has had it. That book has been under my personal observation for over twenty years.

"MR. MITCHELL: I offer in evidence the Whitefield catalogue identified by the witness and ask the Notary to mark the same 'Defendant's Exhibit C, Whitefield catalogue.'

"MR. RICHMOND: Same objection to the offer as urged to defendant's Exhibits A and B."

We used the catalogues, Defendant's Exhibits A, B and C, to select merchandise which we wished to order from them, and did order. We first purchased merchandise at Birmingham in 1881 and have continued to purchase merchandise more or less ever since. The book that you now show me is the book in which we record our orders for importation of merchandise from abroad. That book is in use at the present time. I can tell by looking at that book that it has been in the possession of the Judd Company since 1882. I base that statement on my own knowledge. I find orders given George Whitehouse for merchandise which we purchased, which confirms my knowledge. The entries in this book were made by our company in the regular course of business. I find in this book reference to the goods of Tonks, Ltd., of George Whitefield and George Whitehouse. They are copies of orders which I placed personally with the manufacturers in Birmingham. Referring to Exhibit D, I find on page

(Testimony of John Day)
31 order from George Whitehouse, and on page 91 from William Tonks. The hook that you hand me is known as the Ashmore hook. It is made for the purpose of hanging draperies and is manufactured by the H. L. Judd Company. In the manufacture and sale of this hook, we refer to it as the Ashmore patented hook.

"MR. MITCHELL: I offer the specimen pin referred to by the witness and request the Notary to mark the same 'Defendant's Exhibit E, Ashmore Patented Pin.'"

The pin that you show me is a pin that was made and patented by John Day, myself. This pin has been manufactured and sold by the H. L. Judd Company for many years. The patent was taken out I think about twenty-five years ago. We have sold a great many of them. The purpose for which this hook was used was for hanging draperies. These hooks were sold all over the United States. I do not remember the number of the patent covering this hook.

"MR. MITCHELL: Defendant offers in evidence the so-called 'Day' pin referred to by the witness and asks that the same be marked 'Defendant's Exhibit F, Day Pin.'"

The order book, Exhibit D, is in use at the present time, but we are importing very few goods today.

On

Cross-Examination,

the witness Day testified as follows:

I have been president of the H. L. Judd Company since 1900, and as president of the Judd Company I am its executive and directing head. I am not acquainted with the defendant corporation, LeSage & Company, but I have met Mr. LeSage once. We sell LeSage & Com-

(Testimony of John Day)

pany merchandise. I mean by "we" the H. L. Judd Company. The H. L. Judd Company manufactured the hooks which were sold by the defendant, LeSage & Company, Inc., which are alleged to infringe the letters patent of plaintiffs. I do not know that the H. L. Judd Company have contributed anything to the defense of the defendants, LeSage & Company, in this suit. H. L. Judd Company, to my knowledge, have not contributed or borne or agreed to bear any of the expense of defendant, LeSage & Company, in this suit now before the court. It is my understanding that eventually the H. L. Judd Company will pay for the cost of defending this suit by the defendant LeSage & Company, Inc. We will protect any customer of ours in any suit brought against it. It is my understanding that the H. L. Judd Company will pay all the expenses of this litigation, but I do not understand that the H. L. Judd Company is conducting the defense. H. L. Judd Company engaged the firm of Mitchell & Bechert, attorneys at law of New York City, to appear as solicitors for defendant in this case. The H. L. Judd Company have agreed to pay the fees of Mitchell & Bechert and the other costs of defending this cause.

I first saw a device like Defendant's Exhibit E about six years ago. I am testifying from unaided recollection. It may have been less than six years ago, of course, but I can find the record to be exact. Some of the testimony that I have given concerning the dates when I first saw the catalogues, Defendant's Exhibits A, B and C, is by my unaided recollection, and some of it is aided. I mean by "aided recollection", referring to Exhibit B, I would call the written quotations made by George Whitehouse, dated

(Testimony of R. D. H. Vroom)
June 9, 1882, pasted in the catalogue, would be aided information. Another thing that aids my recollection is my trip to England in 1881, also in 1883, also in purchasing merchandise from these people selected from the catalogues in question, enables me to say that we had constant use of these catalogues in the conduct of our importations. This book, Defendant's Exhibit D, shows that we made purchases of merchandise about the same time, of merchandise selected from these catalogues. Exhibit D does not refer to the catalogues. It refers only to the merchandise.

I have no knowledge that we have agreed to pay the costs of LeSage & Company, but I will say here that we shall do so. We would be a small concern if we did not do so.

On

Redirect Examination,

Mr. Day testified as follows:

Referring to Defendant's Exhibit E, the Ashmore pin, I can produce a document that would identify the date when we first began to manufacture and sell that pin. The document referred to is a contract made with Mrs. Ashmore, the inventor of the pin. We made a contract with the lady to manufacture and sell the article on a royalty basis. The date on that document would prove what we are saying. My age is between 78 and 79 years.

R. D. H. VROOM,

a witness called on behalf of defendant, being duly sworn, testified as follows:

(Testimony of R. D. H. Vroom)

My name is Robert D. H. Vroom. I reside at Port Richmond, Staten Island. My age is 55. My occupation, sales manager of the H. L. Judd Company. I entered the employ of H. L. Judd Company in 1888, as city bill clerk; I was advanced to out-of-town bill clerk; then purchase ledger clerk; then sales ledger clerk; cashier, then to the sales department. In 1897 I was made a traveling salesman, traveling from Kansas City west. Subsequently, Cincinnati and Columbus were added to my territory. About November 30, 1911, I ceased traveling and came into the store. Since that time I have been in charge of sales, also interested in the manufacturing of our goods, getting up new items. I am now a director and secretary of the company, assistant treasurer, and also still sales manager.

In December, 1911, the key to a private closet was turned over to me. In that closet were the books, Exhibits A, B, C and D. Shortly thereafter I reviewed them with an idea of looking over the early English manufacture and seeing if there was anything we could adapt to our manufacturing business, and found numerous items in those books which were inspirations for goods subsequently made by us. Some of these items are still made in stock and still selling. These books, Defendant's Exhibits A, B and C, from December, 1911, until two or three years ago, reposed in the original private closet. Our private records, however, have so enormously increased of recent years that it was necessary to make more room for records or store these records elsewhere. I then went through all the contents of this closet, dispensed with some old books, but these have been securely packed in a case under my juris-

(Testimony of R. D. H. Vroom)
diction since that time. I do not mean that these books have been securely packed since 1911; probably since 1922. 1911 to 1922 they were in our private closet with a Yale lock. I recognize Defendant's Exhibit D, Judd Foreign Purchase Book, as one of the books. I also recognize the handwriting in that book. The handwriting of some of the items is by Fred Judd, a nephew of H. L. Judd, who came with us about 1880, but who left our service prior to my becoming sales manager in 1912. I also recognize the handwriting of Mr. F. W. Prentiss, who is now treasurer of the company and who is now at 87 Chambers Street. He has not made entry in these books since 1911, at which time he turned them over to me. This book, Defendant's Exhibit D, contains a copy of foreign purchases by H. L. Judd Company. I find in Defendant's Exhibit D references to purchases from Tonks, Ltd., George Whitehouse and George Whitefield. Referring to Defendant's Exhibit D, I have just reviewed the Tonks catalogue and find that we bought from William Tonks towel rails No. 4087, illustrated on page 158 of Exhibit A, the reference being copy of invoice on page 93 of Exhibit D, invoice date May 31, 1883. I also find in catalogue Exhibit B towel rail 549 and 550 on page 8 and then in Exhibit D a copy of foreign invoices, invoiced by Mr. George Whitehouse, dated Feb. 6, 1883, calling for one dozen towel rails 549 and 550 and 551. These catalogues were used to buy goods from English manufacturers due to the fact that they had no representatives traveling in this country.

"MR. RICHMOND: Motion is made to strike the last portion of the witness' answer, 'These catalogues were used to buy goods from English manufacturers due to the fact that they had no representatives traveling in this

(Testimony of R. D. H. Vroom)

country.', on the ground that according to Exhibit D and to the testimony of the witness himself these entries were made several years before the witness came with the H. L. Judd Company or its predecessors; furthermore, that such testimony is the opinion and conclusion of the witness."

Defendant's Exhibit E, the Ashmore hook, was made by the H. L. Judd Company at the Wallingford factory and sent down to New York and I took it out of one of our regular boxes, sent it by a messenger to this office. We began making these pin hooks shortly after the issuance of a patent to Mrs. Ashmore. These goods were on the market before 1918. I am sure our records will show that we made sales prior to 1916. I know of no other hook exactly like the sample, Exhibit E, which was made under Mrs. Ashmore's patent. The Ashmore patent 1,069,999, which you have handed me, is the patent which is referred to in defendant's answer, and that is the patent to which I made reference in my previous answer. The H. L. Judd Company has manufactured hooks like Exhibit E for more than eight years and has offered them for sale all over the United States. They have been offered for sale all over the United States. They have been illustrated in catalogues which have been sent to all parts of the United States, and numerous sales have been made in the United States. There is a document in the files of the H. L. Judd Company which would fix the date when we first began to sell hooks like Exhibit E. The document I refer to is factory records of shipments and bonuses paid to Mrs. Ashmore. There are records in New York showing the actual sales of Ashmore hooks. We sold these hooks under a license from Mrs. Ashmore.

The witness R. D. H. Vroom testified as follows on

Cross-Examination:

I am quite a large stockholder in the H. L. Judd Company and am acquainted with the defendant, LeSage & Company, Inc. The H. L. Judd Company agrees to defend any suit against our clients when we manufacture the merchandise that they buy from us and somebody objects to: The H. L. Judd Company has agreed to defray the expenses of the defense of this suit. I do not know that the H. L. Judd Company has agreed, in the event of a decree being entered against the defendant, LeSage & Company, Inc., for profits and damages, that it will pay any such awards as may be given by the court or not, but if it has not, it will. My testimony regarding the first manufacture of this hook is not based upon my unaided recollection. My testimony in that regard is based upon a copy of the patent, because shortly after the patent was issued we were in production on the hook, I mean the Ashmore pin hook.

The witness Vroom testified as follows on

Redirect Examination:

The paper called "License" that you show me, I recognize. It is a contract entered into by the H. L. Judd Company, Inc., and Edith Bancroft Ashmore, to manufacture and sell exclusively the Ashmore pin. That document aids my recollection or memory, as the case may be, of the date when we began to sell the Ashmore patented pin. We began manufacturing and offering for sale the Ashmore pin within six months after that contract was signed. We were offering the Ashmore pin hooks for sale before January 1st, 1915, probably July of 1914. We

(Testimony of R. D. H. Vroom)

have sold the Ashmore hook continuously since that time. We are selling them today.

"MR. MITCHELL: I offer in evidence agreement between Edith Ashmore and H. L. Judd Company, dated January 14, 1914, and the same is marked 'Defendant's Exhibit G, Ashmore Royalty Contract.'

The Ashmore contract is signed for H. L. Judd Company by John Day, President, who is the same John Day that testified here today. I recognize the signature, John Day, President, as being the signature of John Day who testified today.

Recross-Examination

the witness Vroom testified as follows:

The portion or portions of Defendant's Exhibit G which call to my memory the manufacture of the Ashmore hook in July, 1914, are the words, "Signed at New York, this 14th day of January, 1914." The reason that the date of the contract, 14th day of January, 1914, fixes the time in my memory, is that it took us two or three months to get out the tools; it took us but a short time to produce the goods after the tools were made. In 1914 business conditions, if you recall, were very unsatisfactory. We hadn't much work on hand. We had very little new goods in process. It rarely takes us over six months to get out new goods after we have decided to make them. Generally two or three months. My testimony is based on how long it generally takes our company to get under production on a device, rather than upon my memory of the first manufacture of this Ashmore hook, as far as the exact date is concerned, but there is no doubt in my mind that we were manufacturing those goods more than eight years ago.

(Testimony of William H. Edsall)

WILLIAM H. EDSALL,

a witness produced on behalf of defendant, being duly sworn, testified as follows:

My name is William H. Edsall; age 70 plus; residence, Wallingford, Connecticut; occupation, manufacturer. I am Vice-president of the H. L. Judd Company. I have been connected with that company more than 52 years, since 1884 as a director, and since 1900 as vice-president. As to my duties as vice president, I have charge of the manufacturing part of the business. I have been in charge of the manufacturing end of the business over forty years. I recognize Defendant's Exhibit F. It is a hook that was manufactured by us. I would say that we have manufactured it for over forty years. It is made of spring brass wire. We make possibly a dozen styles of other types of spring hooks, and they are mostly made from spring brass wire. We use spring brass wire to make tension. The hook would be of very little value if it did not have tension. I have seen a hook very similar to Defendant's Exhibit 100 for Identification. This hook just shown to me, Defendant's Exhibit 100 for Identification, was manufactured by H. L. Judd Company. It was first manufactured by us in the fall of 1926, I think in the late fall. At that time I did not know of the patent in suit. The letter which you show me I recognize. I dictated it and signed it. I notice there is attached to it what appears to be an envelope. I recognize that envelope as being the envelope in which I mailed the letter. After mailing this letter, it was returned to the post office undelivered.

"MR. MITCHELL: I ask the Notary to mark the letter for identification as 'Defendant's Exhibit 101 for identification.'"

(Testimony of William H. Edsall)

My attention was never called to Letters Patent No. 1,334,661, dated March 23, 1920, to James W. McGhee, but I investigated it myself. The circumstances under which I investigated it are as follows: We had some correspondence in the spring of 1921 with our representative on the coast regarding the manufacturing of this McGhee hook as now made. That correspondence was sent me by Mr. Vroom. I returned it with comment at the time, calling attention to the various hooks that we made, questioning the advisability of putting in another hook in our extended line. My recollection is the inquiry came regarding supplying McGhee with a quantity of these hooks and as I understood from the correspondence his credit was uncertain and his representation that he was to get a new patent, under the circumstances it was unwise for us to make any agreement with him until we knew the terms of his patent and were satisfied as to his credit. Further consideration of the matter was dropped until the spring of 1926.

I reviewed a copy of the patent and later submitted it to our attorneys, who advised the McGhee hook was not made in accordance with that patent (No. 1,334,661). I never saw a hook made in accordance with patent No. 1,334,661. Our company first learned of the existence of the patent in suit in the spring of 1927.

"MR. MITCHELL: I offer in evidence McGhee patent No. 1,334,661 of March 23, 1920, for a drapery hook for use as part of the witness's deposition. Notary marks the same Defendant's Exhibit H."

(Testimony of William H. Edsall)

On

Cross-Examination

the witness Edsall testified as follows:

The hook that you show me, Defendant's Exhibit 100 for Identification, is the hook that I had the correspondence about in the spring of 1921. The correspondence was had between myself and Mr. Vroom. I don't know where that correspondence is at the present time. The testimony that I am giving at this time is not from my unaided memory or recollection. I have some few copies in my correspondence file with Mr. Vroom with relation to this matter. I have those copies with me. (Witness produces correspondence.)

"MR. RICHMOND: The correspondence just produced by the witness is introduced in evidence as Plaintiff's Exhibit No. 200 to the deposition of William H. Edsall. The Notary is asked to mark the same accordingly."

The correspondence which is mentioned in Plaintiff's Exhibit 200 to the deposition of William H. Edsall, I returned to Mr. Vroom. We did not begin the manufacture of hooks like Defendant's Exhibit 100 for Identification until 1926. The circumstances that caused us to commence the manufacture of such hooks at that time was probably the call from our representative on the coast. I mean that there was a demand for such a hook on the Pacific coast at that time. Our representative on the Pacific coast did not send samples of the McGhee hook directly to me, but I received the hooks from our New York office. I am unable to state whether I received the samples from our New York office through the mail or whether the sample was delivered personally. The sample furnished by the New York office

(Testimony of William H. Edsall)

was contained in a carton. This carton was not labeled that they were manufactured by McGhee & Jinks at Los Angeles, California, and that Kirsch Manufacturing Company was the distributor of those hooks. The carton was labeled, according to my recollection, substantially, "one gross of hooks, patented, McGhee & Jinks, Manufacturers, Los Angeles." That is my recollection. When I received this carton of McGhee & Jinks hooks, I recognized these hooks as being similar hooks that I had considered in 1921, and to which I referred in my correspondence, Plaintiff's Exhibit 200 to the deposition of William H. Edsall. By the use of the word "similar", I mean that the hooks were identical in construction. It is my recollection that I was informed in 1921 that Mr. McGhee was going to apply for a patent on the hooks like Defendant's Exhibit 100 for Identification. I wrote to McGhee & Jinks direct. I had never had any direct correspondence with McGhee & Jinks in 1921 concerning these hooks. I cannot tell you why I did not seek the information from our Pacific coast representative. We did not have our patent attorneys make a search to find whether a patent had been issued to McGhee. We commenced manufacturing the alleged infringing hook about six months after receiving the sample of the McGhee hooks from our New York office in 1926. I cannot fix the day and month from my memory the first manufacture of the alleged infringing hook, but I can obtain it from our records; but I would say it was in the late fall of 1926. I believed in 1926 that the McGhee mentioned on the label of the carton was the same McGhee who had had the matter of manufacturing the identical hook up with our company in 1921. I had before me at our plant in

(Testimony of R. H. H. Vroom)
Wallingford, Connecticut, the McGhee & Jinks hook at the time we designed and manufactured the alleged infringing hook like Defendant's Exhibit 100 for Identification. Apparently the McGhee & Jinks hook and Defendant's Exhibit 100 for Identification are made of the same material, which is spring brass wire. They are both made for the same purpose, and, I assume, are sold in open competition with each other, and the purpose for which we manufactured the alleged infringing hook was to sell them to the trade in competition with the McGhee & Jinks hook.

The witness R. D. H. Vroom, recalled for further

Cross-Examination,

testified as follows:

In 1926 I furnished a carton of McGhee & Jinks hooks to Mr. Edsall of our company, and the purpose of furnishing those McGhee hooks to Mr. Edsall was to see if in his opinion we could make it without infringing anybody's patent. The box, as I recall, was marked "McGhee & Jinks." I am not certain that it gave the location of the manufacture. I am certain that it bore no patent date. I think it was marked "Patented." After these hooks were furnished to Mr. Edsall, Mr. Edsall reported that his file indicated that McGhee & Jinks had taken out a patent on a pin hook, but that the hook and the box marked "Patented" was not made under patent No. 1,334,661, which was the only patent that he had in his file. I did not know that the H. L. Judd Company had considered the manufacture of the identical hook in 1921 for Mr. McGhee. I cannot affirm that the hook mentioned in Plaintiff's Exhibit No. 200 to the deposition of William H. Edsall is the identical

(Testimony of William H. Edsall)

hook of the patent in suit. I cannot state at this time that the construction of the hook is as referred to in Plaintiff's Exhibit 200 to the deposition of William H. Edsall. I have no memory or recollection concerning the hook referred to in Plaintiff's Exhibit 200 to the deposition of William H. Edsall, and this correspondence, Plaintiff's Exhibit 200 to the deposition of William H. Edsall, does not refresh my memory or recollection.

WILLIAM H. EDSALL

was recalled on behalf of defendant for

Redirect Examination,

and testified as follows:

My office is now at Wallingford, Connecticut. It has not always been located there, but was formerly in Brooklyn. It was removed to Wallingford in 1896. I am not familiar with Defendant's Exhibits A, B or C. In 1921, when I had the correspondence with our New York office, which has been marked Plaintiff's Exhibit 200 attached to the deposition of William H. Edsall, I did not know about the Tonks hook No. 200 illustrated on page 62 of Defendant's Exhibit A. I did not learn of it until this fall. I think Mr. Day wrote me something to that effect. In 1921, when this correspondence passed, Plaintiff's Exhibit 200, I did not know of the Whitehouse hook No. 690, and the Whitehouse hook 691, shown on page 5 of Exhibit B. In 1921, at the time of this same correspondence, Plaintiff's Exhibit 200, I did not know of the Whitefield hook No. 105 and the hook 108 illustrated on page 136 of Defendant's Exhibit C. In 1921 I had not examined any of the following British patents: No. 5870 of 1886; No. 28885 of 1912, and 15079 of 1910.

(Testimony of R. H. H. Vroom)

R. D. H. Vroom,

a witness on behalf of defendant, recalled for further Cross-Examination,

testified as follows:

To the best of my knowledge and belief, the H. L. Judd Company, during the time that I have been with that company, has not had catalogues of Tonks of later date than Exhibit A. I do not know of my own knowledge that H. L. Judd Company or its predecessors had later editions of the Tonks catalogues, because catalogues come in and I do not always see them. It is not my testimony that the items I have testified about that were ordered from Tonks might have been ordered from later catalogues than Exhibit A. I know that is not correct, because we haven't bought goods from Tonks in a great many years. My testimony is that we may have received a later catalogue from Tonks and the same may not have come to my notice. I also know that we have made no purchases from Tonks in a great many years. I can certify that the items testified to by me in my redirect examination were ordered from catalogue, Defendant's Exhibit A, and were not ordered from later catalogues. I was not in the employ of the H. L. Judd Company or its predecessor or predecessors at the time the items were ordered from Tonks, Ltd. In 1912 the records of our foreign purchases and foreign catalogues were turned over to me. These records are exhibits in this case. These are the only catalogues that we had reference to in making purchases from the English manufacturers prior to 1912. We practically have made no foreign purchases of drapery hardware in the last fifteen years, manufacturing or

(Testimony of R. H. H. Vroom)
obtaining from American manufacturers what goods we offered for sale. I do not know of my own knowledge what catalogues were used by H. L. Judd Company or its predecessors in ordering goods from foreign manufacturers prior to 1912, and I do not know of my own knowledge what catalogues of foreign manufacturers were received by H. L. Judd Company or its predecessors prior to 1912.

On

Re-Direct Examination

the witness Vroom testified as follows:

In December, 1911, I finished my duties as traveling salesman. I came into the store, with the assurance that I would be made an officer of the company, but was immediately instructed to take up the duties of sales manager. I was handed the key of a locker containing old records and old catalogues. These catalogues were reviewed by me in December, 1911, with the idea of endeavoring to find some items in these early publications that could be made in our factory. Some items shown in these catalogues have been made by us for years. We are still selling some of them. In 1911, when I was given the key to this cabinet, I saw the volumes which have been marked in evidence here as Plaintiff's Exhibits A, B, C and D, and these volumes have been ever since that date in the same locker for at least ten years. Subsequently, to make room for other records, more modern records, they have been sealed. They have been sealed for three or four years, possibly five. That locker was opened quite frequently, because each month we placed therein our salesmen's records.

(Testimony of R. D. H. Vroom)

On

Recross-Examination

the witness Vroom testified as follows:

I stated on redirect examination that upon the delivery of these old records and catalogues to me in December, 1911, that I reviewed them with the purpose of manufacturing some of them for sale by our company. We made items that were similar to those shown in the catalogues. I got my inspiration from those old catalogues for those articles that our company manufactured. In the review of these old catalogues, I did not find anything therein that gave me the inspiration to manufacture a drapery hook like Defendant's Exhibit 100 for Identification. In my review of these catalogues, I probably saw the Tonk's hook No. 200 on page 62, but paid no attention to it.

On

Redirect Examination,

the witness Vroom testified as follows:

The reason I did not pay any attention to it was that I was looking at that time for ideas that would supply us with ornate merchandise that run into money rather than looking for little wire articles that run into quantity and not dollars. The manufacture and sale of drapery hardware is subject to changes in fashion. I mean by that that we have in our line today items that we made twenty-five and thirty years ago, illustrated in old catalogues which after running awhile would drop and have subsequently come back. When I first started traveling in 1897 there was a demand for ornate hardware, furnishings, and furniture. The empire style was prevailing. We sold quantities of expensive hardware, also large numbers of

(Testimony of John Day)

onyx tables, cabinets, etc. Subsequently the style changed and demand developed for fixtures that did not show the hardware,—everything concealed. Onyx tables and cabinets have gone entirely out of style. There is now a recurrence and the hardware in the home is very prominent.

John Day,

a witness called on behalf of defendant, recalled for further

Redirect Examination,

testified as follows:

The book, Defendant's Exhibit D, records the orders placed for foreign merchandise. The merchandise that I referred to in my direct examination referred to the merchandise exhibited in the catalogue, hardware. I mean the catalogue of the manufacturer of whom we were purchasing. For instance, if we were purchasing merchandise from that catalogue (indicating), we wouldn't be referring to some other catalogue. In my testimony, where I used the word "merchandise," I was referring to the merchandise shown in any of the catalogues, Defendant's Exhibits A, B or C.

"MR. MITCHELL: I offer in evidence certified copy of file wrapper and contents of the patent in suit, and the same is marked by the Notary, 'Defendant's Exhibit J'.

"I offer in evidence copy of British patent to French, No. 28885, of December 16, 1912, certified by the Commissioner of Patents, and the same is marked 'Defendant's Exhibit K'.

"I offer in evidence copy of British patent to Harrison, of April 28, 1886, certified by the Commissioner of Patents, and the same is marked 'Defendant's Exhibit L'.

(Testimony of John Day)

"I offer in evidence copy of British patent to Timmis, of June 23, 1910, certified by the Commissioner of Patents, and the same is marked 'Defendant's Exhibit M'.

"I offer in evidence printed copies of the following United States Letters Patent:

Fay	15,226, July 1, 1856,
Gunn	303,370, Aug. 12, 1884,
Riggs	392,363, Nov. 6, 1888,
Nash	404,102, May 28, 1889,
Savage	728,769, May 19, 1903,
Lacoin	751,305, Feb. 2, 1904,
Bliemeister	1,170,601, Feb. 8, 1916,

and the same are marked collectively 'Defendant's Exhibit N, Prior Art Patents'.

"MR. RICHMOND: Objection is made to the introduction of the above United States patents, unless limited for the sole purpose of showing the state of the art. Objection is specifically made to the introduction of these prior patents as Exhibit N, on the ground that they have not been pleaded and therefore cannot be introduced for the purpose of anticipating the patent in suit.

"MR. MITCHELL: Plaintiff offers in evidence printed copy of Ashmore patent No. 1,069,999, dated August 12, 1913, and the same is marked 'Defendant's Exhibit O'."

"MR. BLAKESLEE: We offer a certified copy of a public record of Great Britain, vised by the United States Consul at London, with respect to copyrighting of the Tonks catalog, which is in evidence and which has gone to Europe on the commission, and with it a photostatic copy of the particular sheet of material on that issue of

(Testimony of John Day)

prior publication, and showing in cut No. 200 a particular form of hook which we rely upon. We offer these two together as Defendant's Exhibit AA, to start a new series.

"MR. RICHMOND: That is objected to on the ground it is incompetent, irrelevant and immaterial. The proper foundation has not been laid, and there is nothing in the certificate to show that it refers to the photostatic copy that is offered with it as a part of the exhibit. And, furthermore, that the document, such as the certified copy is supposed to be of a copyright, is not made by the proper authorities and is not admissible under the statute as required in such cases.

"THE COURT: You may submit the offer and the objection to it, to be considered if the depositions come.

"MR. BLAKESLEE: We will offer at this time, as Defendant's Exhibit BB, a photostat copy of a particular page of the Whitehouse catalog, which also is in transit in conection with the commission abroad, for the present use of the court, of course to be connected up with the catalog which was offered in evidence in New York, calling particular attention to cut No. 691, on the same grounds we made the offer of Exhibit AA.

"MR. RICHMOND: The same objection as was urged against Defendant's Exhibit AA, is urged against the introduction of Defendant's Exhibit BB.

"THE COURT: Yes, and the same understanding, with a reserved ruling.

"MR. BLAKESLEE: We offer in evidence a letter, as Defendant's Exhibit CC.

"We also offer in evidence a letter dated March 31, 1926, from H. L. Judd Company, Inc., signed by Mr. Edsall, vice president, to the plaintiff here.

(Testimony of John William Whitehouse)

"MR. RICHMOND: I object to that on the ground it is self-serving; that it is incompetent, irrelevant and immaterial and not responsive to any of the issues in this case.

"THE COURT: Let me see it. It may be filed on the question of good faith, for whatever it may be worth. It may go to the question of damages."

(The letter was marked Defendant's Exhibit DD.)

"MR. BLAKESLEE: We would like to offer also a box of plaintiffs' small size drapery hooks."

(The box of hooks was marked Defendant's Exhibit EE.)

Defendant introduced in evidence the deposition of John William Whitehouse, of Birmingham, England.

JOHN WILLIAM WHITEHOUSE,

a witness called on behalf of defendant, being duly sworn, testified as follows:

My name is John William Whitehouse; age 51 years; of the firm of George Whitehouse & Co., (Birmingham), Ltd., 48 William Edward Street, Birmingham, England, tube drawers and brassfounders. I have been connected with George Whitehouse & Co. and its predecessor for 35 years. I was the son of George Whitehouse, and served in every capacity, from clerk to managing director. I was connected with the business formerly conducted by George Whitehouse in Birmingham, England, since 1892 to date. I started as clerk, and through succeeding grades to managing director. The firm of George Whitehouse was converted into George Whitehouse & Co., (Birmingham), Ltd., upon the death of the late George Whitehouse, for

(Testimony of John William Whitehouse)
family reasons. I was familiar with the sales and advertising methods employed prior to September 22, 1920, by George Whitehouse and by George Whitehouse & Co., (Birmingham), Ltd., and fully acquainted with all details of the business. To my certain knowledge, I can identify the purple-covered book (marked in this suit "Defendant's Exhibit B, Whitehouse Catalogue 1882"), and particularly page 5 thereof. It is the catalog for general issue to customers inquiring for such goods issued by George Whitehouse and containing illustrations of goods produced and sold by George Whitehouse. I cannot be certain of the exact date when this book was printed, but undoubtedly prior to the 1892. This catalog has been widely distributed by George Whitehouse & Co., (Birmingham)', Ltd., for many years prior to 1920 to practically all customers of the firm, such as ironmongers, house furnishers and shop fitters. It was available to anyone applying for the goods of George Whitehouse & Co., (Birmingham), Ltd., up to about the year 1895, when it was superseded by a new one. Not to my knowledge were any copies of the book herein referred to (Defendant's Exhibit B) ever deposited in a library or other place open to the public prior to September 22, 1920. No copies of the book herein referred to (Defendant's Exhibit B) were ever deposited in a library or other place open to persons interested in the manufacture or sale of the articles shown therein, prior to September 22, 1920. The sheet of paper entitled "Memorandum", dated June 9, 1882, attached to the inside of the front cover of this book (Defendant's Exhibit B) I can identify as a memo-

(Testimony of Harold Norman Wright)
randum and a quotation of prices of that date from George Whitehouse & Co., (Birmingham), Ltd.

Defendant introduced the deposition of Harold Norman Wright.

HAROLD NORMAN WRIGHT,

a witness called on behalf of the defendant, being duly sworn, testified as follows:

My name is Harold Norman Wright; age 34; of 201 Moseley Street, Birmingham, England; secretary of Tonks (Birmingham), Ltd. I am now secretary of Tonks (Birmingham), Ltd., and have been such since 1921. I was never conected with Tonks, Ltd., of 201 Moseley Street, Birmingham, England. The present firm of Tonks (Birmingham), Ltd., was for many years, up to about 1919, known as Tonks Ltd., these names referring to the same company. The additional word "(Birmingham)" was added to the title of the firm about 1919. I am not familiar with the sales and advertising methods employed prior to September 22, 1920, either by Tonks Ltd. of 201 Moseley Street, Birmingham, England, nor by Tonks, (Birmingham), Ltd. I can identify the brown covered book accompanying these interrogatories, and particularly page 62 thereof (the book being marked in this suit "Defendant's Exhibit A, Catalog of Tonks Ltd." The book, Defendant's Exhibit A, is a catalogue of builders' hardware and general brassfoundry, issued by Tonks Ltd. in 1895, and bears our well known trade mark, the sun, with the words underneath W. T. & S., the original name of the firm being William Tonks & Sons; The book was

(Testimony of Harold Norman Wright)
issued in 1895. This book was circulated in 1895 and for some years after that date, until the next catalog was printed, which, to the best of my recollection, was 1905. It was of course circulated by Tonks Ltd. to all their customers, and would certainly run into several hundreds of copies. These books were distributed mainly to ironmongers and hardware dealers. Prior to September 22, 1920, the book was available for examination by anyone calling at our office, and I have at present in my desk an identical copy of this edition. It is improbable, however, that without some very particular reason a copy would be sent out to anyone asking for it during the last few years, owing to the fact that many patterns in it are obsolete. It is improbable that any copies of this edition would be sent out after the publication of a later one, which took place about 1905. Many of the illustrations in this book are our own registered designs and patterns, which of course were duly registered or patented at the Patents Office. There are, however, many articles which were and are manufactured by members of the brassfoundry trade. I do not know whether Tonks Ltd. deposited one or more copies of the book (Defendant's Exhibit A) for the purpose of obtaining copyright protection. I do not know whether or not Tonks Ltd. ever obtained a copyright on said book (Defendant's Exhibit A). Without doubt, Tonks, Ltd., designated on the photostatic copy of the certificate entitled "Public Record Office Copy," accompanying these interrogatories, is the Tonks, Ltd., of 201 Moseley Street, Birmingham, the company about which I have been testifying. The "Centenary Edition of General Brassfoundry 1895", given in said certificate, as the title

(Testimony of Harold Norman Wright)
of the book copyrighted, is the book heretofore mentioned as "Defendant's Exhibit A, , Catalogue of Tonks, Ltd." Tonks Ltd., 201 Moseley Street, Birmingham, distributed or circulated prior to September 22, 1920, a book entitled "Centenary Edition of General Brassfoundry 1895". Tonks Ltd. printed and distributed or circulated more than one book, with this same title, that is, "Centenary Edition of General Brassfoundry 1895." I do not know whether or not one or more copies of the book (Defendant's Exhibit A) were ever deposited in a library or other place open to the public, prior to September 22, 1920. I do not know whether or not one or more copies of the book ("Defendant's Exhibit A") were ever deposited in a library or other place open to persons interested in the manufacture or sale of the articles shown therein, prior to September 22, 1920.

[Endorsed]: No. M-27-M. United States District Court Southern District of California Southern Division. McGhee & Jinks, plaintiffs vs. Le Sage & Company, Inc., defendant. Statement of Testimony Under Equity Rule 75. Due Service and receipt of a copy of the within Statement of Testimony is hereby admitted this 11th day of December, 1928. Raymond Ives Blakeslee, atty for appellee. Lodged Dec. 11 1928, R. S. Zimmerman, Clerk, by M. L. Gaines, Deputy Clerk. Engrossed Statement of Evidence Filed Dec. 24, 1928. R. S. Zimmerman, Clerk, by Edmund L. Smith Deputy Clerk. Lyon & Lyon, Frederick S. Lyon, Leonard S. Lyon, Lewis E. Lyon 708 National City Bank Building, Los Angeles, Cal. Attorneys for plaintiffs.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION.

McGHEE & JINKS,)	In Equity No. M-27-M.
Plaintiffs-Appellants,)	On Appeal by Plaintiffs to U. S. Circuit Court of Appeals for the
—vs—)	Ninth Circuit.
	STIPULATION AS TO
LE SAGE & COMPANY, INC.,)	TRANSCRIPT OF RECORD AND EXHIBITS ON
Defendant-Appellee.)	APPEAL.

Plaintiffs-Appellants having served upon counsel for Defendant-Appellee copy of "Statement of Testimony under Equity Rule 75" and Notice of Lodgment of Said Statement and Request for Approval Thereof, and Præcipe for Transcript of Record on Said Appeal, and the same having been examined, checked and considered by counsel for Defendant-Appellee, and in order to expedite said appeal and waive the necessity of formal approval of said Statement and filing of Præcipe under Equity Rule 75 by defendant-appellee,

IT IS HEREBY STIPULATED AND AGREED by and between the parties to this cause, as follows:

That the said Statement of Testimony filed by plaintiffs be and stand amended as follows: Cancel "right", first word line 1, page 3; substitute "rod" for "road", line 11, page 3; substitute "87" for "8", line 22, page 4; substitute "of" for "if", line 5, page 6; substitute "soliciting" for "citing", line 11, page 6; substitute "Whitehouse" for "Whisehouse", line 18, page 6; substitute "Whitefield" for "Whitfield", lines 22 and 27, page 7, and lines 4, 6 and 22, page 8; substitute "this" for "thos", line 5, page

9; cancel "Company", second occurrence, line 21, page 9; substitute "quite" for "quote", line 31, page 13; substitute "rarely" for "rearly", line 15, page 15; substitute "1920" for "1922", line 9, page 17; substitute "Pacific" for "pacific", lines 1 and 23, page 18.

IT IS FURTHER STIPULATED AND AGREED that all of the physical Exhibits offered in evidence in this cause be transmitted by the Clerk of this Court to the Clerk of the U. S. Circuit Court of Appeals, with the Transcript, including Plaintiff's Exhibits 3-A and 5; and Defendant's Exhibit E, Ashmore Patented Pin, and Defendant's Exhibit F, Day Pin, together with Defendant's Exhibit A, Catalogue of Tonks, Ltd., Defendant's Exhibit C, Whitefield Catalogue, and Defendant's Exhibit D, H. L. Judd Company's Foreign Order Book, all the latter being introduced in connection with the depositions of Day, Edsall and Vroom taken in the case; together with Defendant's Exhibit G, Ashmore Royalty Contract, Defendant's Exhibit 100 attached to depositions, and Defendant's Exhibit 101, registered letter to McGhee & Jinks, Plaintiffs' Exhibit 200 attached to deposition of William H. Edsall, and Plaintiffs' Exhibit photostatic copy of certificate of Public Record Office Copy, referred to in Interrogatory 15 to W. H. Tonks or Harold Norman Wright, and Defendant's Exhibit EE.

AND IT IS FURTHER STIPULATED AND AGREED that true and complete copies of the following Exhibits be contained and included in the printed transcript of record on appeal, to-wit: Defendant's Exhibit H, U. S. Patent to McGhee, No. 1,334,661 of May 23, 1920; Defendant's Exhibit AA, print, and Defendant's Exhibit BB, print;

AND IT IS FURTHER STIPULATED AND AGREED that a true and complete copy of this stipulation be likewise contained and included in said transcript of record on appeal.

Dated: Los Angeles, California, December 24, 1928.

Lyon & Lyon
Henry S. Richmond
Solicitors and Counsel for Plaintiffs-Appellants.

Mitchell & Bechert
James E Neville
Raymond Ives Blakeslee
Solicitors and Counsel for Defendant-Appellee

Approved
Wm P James
U. S. District Judge

[Endorsed]: M-27-M United States District Court Southern District of California Southern Division McGhee & Jinks, Plaintiffs-Appellants, vs Le Sage & Company, Inc., Defendant-Appelle. Stipulation as to Transcript of Record and Exhibits on Appeal. Filed Dec. 24 1928 R. S. Zimmerman, Clerk, By Edmund L. Smith Deputy Clerk Raymond Ives Blakeslee Solicitor and Counsel for Defendant-Appellee 433 South Spring Street, Los Angeles, California.

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF CALIFORNIA SOUTHERN DIVISION

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS, Plaintiffs-Appellants, vs. LeSAGE & COMPANY, INC., a corporation, Defendant-Appellee	In Equity No. M-27-M

NOTICE OF LODGMENT OF STATEMENT OF EVIDENCE UNDER EQUITY RULE 75 AND OF REQUEST FOR APPROVAL THEREOF

To the above named defendant and to Mitchell & Bechert, Raymond Ives Blakeslee, and James E. Neville, its attorneys:

You and each of you will please take notice that on behalf of the above named plaintiffs-appellants James W. McGhee and Edward C. Jinks, we have this day lodged in the Clerk's office of the United States District Court in the Federal Building, Los Angeles, California, a statement of evidence adduced on the trial of the above entitled cause in simple and condensed form as required by Equity Rule 75;

Also please take notice that at the hour of 10 o'clock A. M. on Monday, the 24th day of December, 1928, at the courtroom of the Honorable William P. James, United States District Judge, in the Federal Building, Los Angeles, California, or at whatever time and place and before

whatever Judge this matter may be legally assigned for hearing, we shall ask said Court or judge to approve the statement of evidence hereinbefore mentioned as a true, complete and properly prepared statement of evidence for use on appeal of said cause, and shall upon such approval file such statement as part of the record for the purpose of said appeal under the provisions of said Equity Rule 75. Dated this 11th day of December, 1928.

Lyon & Lyon
Henry S. Richmond
Attorneys for Plaintiffs-Appellants

[Endorsed]: No. M-27-M United States District Court Southern District of California Southern Division James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks, Plaintiffs-Appellant vs Le Sage & Company, Inc., a corporation, Defendant-Appellee Notice of Lodgment of Statement of Evidence under equity rule 75 and of request for approval thereof Due Service and receipt of a copy of the within Notice of Lodgment is hereby admitted this 11th day of December, 1928. Raymond Ives Blakeslee atty for appellee Filed Dec 11 1928 R. S. Zimmerman, Clerk By M. L. Gaines Deputy Clerk Lyon & Lyon Frederick S. Lyon Leonard S. Lyon Lewis E. Lyon 708 National City Bank Building Los Angeles, Cal.

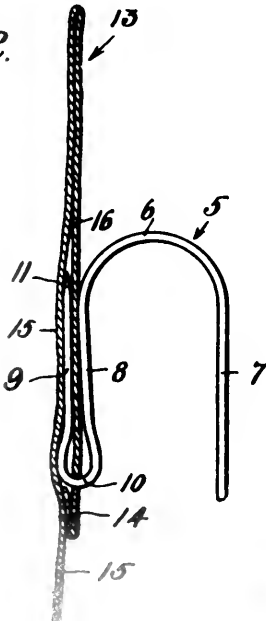
Nov. 27, 1923.

1,475,306

J. W. McGHEE

DRAPERY HOOK

Filed Sept. 23, 1922



INVENTOR.

James W. McGhee

BY

ATTORNEY.

1475306

THE UNITED STATES OF AMERICA
TO ALL TO WHOM THESE PRESENTS SHALL COME:

Whereas JAMES W. McGHEE, of Los Angeles, California, assignor of one-half to EDWARD C. JINKS, of Los Angeles, California, has presented to the Commissioner of Patents a petition praying for the grant of Letters Patent for an alleged new and useful improvement in DRAPERY HOOKS, a description of which invention is contained in the specification of which a copy is hereunto annexed and made a part hereof, and has complied with the various requirements of Law in such cases made and provided, and

Whereas upon due examination made the said Claimant is adjudged to be justly entitled to a patent under the Law.

Now therefore these Letters Patent are to grant unto the said James W. McGhee and Edward C. Jinks, their heirs or assigns for the term of Seventeen years from the twenty-seventh day of November, one thousand nine hundred and twenty-three, the exclusive right to make, use and vend the said invention throughout the United States and the Territories thereof.

In testimony whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington this twenty-seventh day of November, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the United States of America the one hundred and forty-eighth.

(Seal) Thomas E. Robertson
Attest: Commissioner of Patents.

G. P. Tucker
Law Examiner.

(Photo.)

Patented Nov. 27, 1923. 1,475,306

UNITED STATES PATENT OFFICE.

JAMES W. McGHEE, OF LOS ANGELES, CALIFORNIA, ASSIGNOR OF ONE-HALF TO EDWARD C. JINKS, OF LOS ANGELES, CALIFORNIA.

DRAPERY HOOK.

Application filed September 23, 1922. Serial No. 590,013.

To all whom it may concern:

Be it know that I, JAMES W. MCGHEE, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented new and useful Improvements in Drapery Hooks, of which the following is a specification.

My invention relates to drapery hooks, particularly adapted to be detachably secured adjacent the upper edge of a drapery and to engage over a rod, in order that the drapery may be properly hung in place at a window or other opening; and is designed as an improvement on the hook shown and described in the reissue patent entitled Drapery hooks, bearing Number 15263, granted to me Jan. 10th, 1922.

The hook described in the above mentioned patent, although very efficient, has not proven entirely satisfactory, inasmuch as the sharp exposed points on the hook end frequently pricks the fingers of the person handling the drapery, and causing damage to the fabrics by becoming entangled therein; moreover the time consumed in threading the hook through the fabric is objectionable.

It is the object of my present invention to provide a hook for the purpose above described, which will overcome the above recited difficulties and which will be simple, durable, efficient and inexpensive of manufacture, and which may be easily and quickly adjusted to the drapery material.

Another object of my invention is to provide a hook which when secured in position will become yieldingly locked to the drapery material, thus guarding against its becoming accidentally displaced therefrom.

The above and other objects of my invention will be more fully disclosed in the following specification, reference being had to the accompanying drawings in which:

Fig. 1 is a back view of the top edge of a fragment of drapery showing the various stages of the application of my improved hook thereto.

Fig. 2 is a section through the same, taken on the line 2—2 of Fig. 1 viewed in the direction indicated by the arrows.

In carrying out my invention the hook is formed of medium hard and preferably spring wire, bent to form the U shaped hook 5 having the arch 6 adapted to engage over a curtain rod, the hook end 7, and the shank portion 8. The wire at the end of the shank 8 is so bent as to form an arm 9 which extends upwardly along the outer edge of the shank and terminates adjacent the arch 6, the bend at the junction of shank 8 and arm 9 forms a spring loop 10 and the end of arm 9 is sharpened to a point 11, said point extending slightly beyond the junction between the shank 8 and the arch 6 as clearly shown in the drawings. The end of the arm 9 just below the point 11 is adapted to normally rest against the shank 8 as shown at 12.

The top portion of a drapery is shown at 13 which comprises a fabric which is folded upon itself and hemmed at 14 to form the adjacent parallel walls 15 and 16, the wall 15 constituting the body of the drapery.

In Fig. 1 of the drawings the hook designated by the letter A is shown in a position ready to be inserted into the fabric. By tilting the hook slightly sidewise it will be obvious that the fabric wall 16 may be pierced by the point 11 of arm 9 and the hook pressed upward into the fabric as shown at B, the arm 9 resting between the walls 15 and 16 and the wall 16 being impinged between the arm 9 and shank 8, thus holding the hook yieldingly locked in position to the fabric and thoroughly concealing the arm 9 from view. The hook may then be readily turned to assume the position shown at C and then conveniently placed over the curtain rod.

By the above recited construction it will be apparent that the main weight of the drapery will be supported by the loops 10 of the hooks and that the hemmed portion will be held upwardly by reason of being impinged between the shank 8 and arm 9.

It will be observed that when the hooks are secured in position on the draperies, that the pointed ends 11 of arm 9 are concealed between the folds of fabric, and consequently all danger of the hooks becoming entangled in the fabric after attachment thereto is obviated.

What I claim is—

A drapery hook, formed of a single piece of wire bent intermediate of its ends into substantially U shaped formation to provide an arch, a hook end and a shank portion, the end of the shank portion being bent to form a spring loop, and an arm extending upwardly from the loop dis-

posed along the outer edge of said shank and terminating adjacent the junction between the shank and arch, the extreme end of the arm being pointed.

In witness that I claim the foregoing I have hereunto subscribed my name this 12th day of Sept. 1922.

JAMES W. McGHEE.

[Endorsed]: No. M-27-M McGhee & Jenks vs. Le Sage & Co Pltf Exhibit No. 1 Filed 5/3 1928 R. S. Zimmerman, Clerk By Murray E. Wire, Deputy Clerk

Edmund A. Strause Patent Attorney 500 H. W. Hellman Bldg. Los Angeles, Cal.

ASSIGNMENT

For and in consideration of the sum of Ten dollars to me in hand paid, the receipt whereof is hereby acknowledged, I, JAMES W. McGHEE, a citizen of the United States, residing at Los Angeles, in the County of Los Angeles, and State of California, do hereby sell, assign and transfer unto EDWARD C. JINKS, a citizen of the United States, residing at Los Angeles, in the County of Los Angeles, and State of California, an undivided one-half interest in the United States in and to an invention entitled DRAPERY HOOKS, as described and claimed in an application for United States Letters Patent executed by me on September 13, 1922, and in and to the Letters Patent to be issued therefor; and I do hereby authorize and request the Commissioner of Patents to issue the Patent for said invention to said Edward C. Jinks jointly with myself.

Witness my hand and seal this 13th day of September, 1922, at Los Angeles, California,

James W. McGhee

STATE OF CALIFORNIA)
: SS
COUNTY OF LOS ANGELES)

On this 13th day of September, 1922, before me, Lilah Hollister a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared James W. McGhee, known to me to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.

(Seal) Lilah Hollister

Notary Public, Los Angeles County, California.

The above entitled application is hereby identified as bearing S. No. 590,013 filed in the U. S. Patent Office September 23, 1922.

(Seal) James W. McGhee

My commission expires February 25, 1924

[Endorsed]: 162090 M/9 Recorded Oct 9 1923 U. S. Patent Office

Edmund A. Strause 500 H. W. Hellman Bldg. Los Angeles, Calif.

Received and Recorded in U. S. Patent Office Oct 9—1923 In Liber E 120 page 363 of Transfers of Patents. Thomas E. Robertson Commissioner of Patents

Exd E. H.

No. M-27-M Eq McGhee & Jinks vs. LeSage & Co Pltfs Exhibit No. 2 Filed 5/3 1928 R. S. Zimmerman, Clerk By Murray E. Wire Deputy Clerk

LE SAGE & COMPANY, INC.
1018 Santee Street
Los Angeles, California

Sold to M Lambert
Street — Date June 9—1927
City — Order No.
Telephone No. — Department — Terms: Cash
Ship Via — When — Paid
Salesman B — Remarks

Number	Width	Color	Pieces	Yards	Ck.	Description	Price	Ck.	Do Not Use This Column
372				1 Gross		Hooks.	75 cts		

Filled by: — Received by:

[Endorsed]: No. M-27-M McGhee & Jinks vs. Le Sage & Co Exhibit No. 3-B. Filed 5/3 1928 R. S. Zimmerman, Clerk By Murray E. Wire, Deputy Clerk

LE SAGE & COMPANY, Inc.
Drapery Fabrics
(Wholesale Only)

1018 Santee Street Los Angeles, Calif.

March 14, 1927.

REGISTERED MAIL

Lyon & Lyon,
National City Bank Bldg.,
810 South Spring Street,
Los Angeles, California.

Gentlemen:

We acknowledge receipt of your letter which was in the form of a notification that James W. McGhee and Edward C. Jinks are owners of the United States Letters Patent No. 1,475,306 under date of November 27, 1923.

Some few days ago Mr. McGhee called personally and advised us that a certain hook which we recently purchased from H. L. Judd Company was an infringement on his patent hook known as a non-sew-on hook. While your letter does not define the hook in question, we presume that your reference refers to the said hook known as non-sew-on.

The stock of hooks which we received from H. L. Judd is still cased up and we will not attempt to sell them, and we are holding the shipment in our wareroom awaiting the arrival of H. L. Judd Company's representative who is due here on the sixteenth of March at which time we will request from him what disposition his company desires to make of this shipment in question.

We still have in our stock 96 gross of non-so-on hooks purchased from McGhee and Jinks which we will continue to sell until the stock of 96 gross is exhausted, but in no case will we sell the similar hook before mentioned which was purchased from H. L. Judd Company.

These hooks are put up in their own boxes and so labeled and to avoid any misunderstanding, you may verify this statement if you so choose to do so.

Our records show that we have sold 120 gross of H. L. Judd hooks at a profit of 12¢ a gross.

It has ever been our policy to stand for right and justice in all our dealings, and we assure you in this instance you will have our full cooperation.

Yours very truly,

WLL*EF LESAGE & CO., INC.

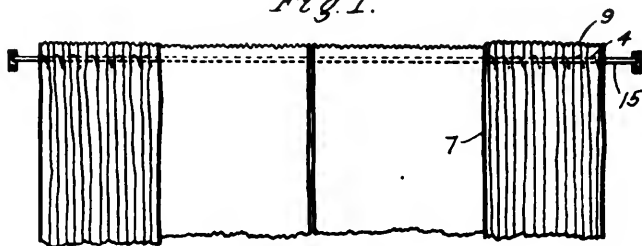
By W. LeSage, Pres.

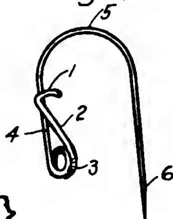
[Endorsed] Received Mar 15 1927 Lyon & Lyon.

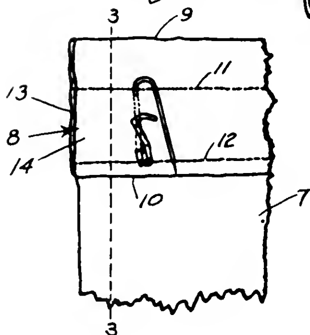
No. M-27-M McGhee & Jinks vs. LeSage & Co defts Exhibit No. 4 Filed 5/3 1928 R. S. Zimmerman, Clerk By Murray E. Wire Deputy Clerk

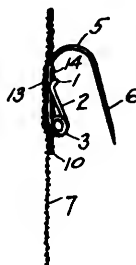
J. W. McGHEE.
DRAPERY HOOK.
APPLICATION FILED MAY 12, 1919.

1,334,661. Patented Mar. 23, 1920.









INVENTOR.
JAMES W. McGHEE
BY
Hazard & Miller
ATTORNEY.

H. L. N. P.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks, Plaintiffs, vs. LeSAGE & COMPANY, INC., a corporation, Defendant.	No. M 27 M Equity

Defendant's Exhibit H.

Attached to New York Depositions

(Photo.)

UNITED STATES PATENT OFFICE.

JAMES W. McGHEE, OF LOS ANGELES, CALIFORNIA.

DRAPERY-HOOK.

Specification of Letters Patent.

1,334,661. Patented Mar. 23, 1920.

Application filed May 12, 1919. Serial No. 294,473.

To all whom it may concern:

Be it known that I, James W. McGhee, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented new and useful Improvements in Drapery-Hooks, of which the following is a specification.

My object is to make an improved drapery hook, and my invention consists of the novel features herein shown, described and claimed.

Figure 1 is a fragmentary front elevation showing a drapery supported by drapery hooks embodying the principles of my invention.

Fig. 2 is a fragmentary rear elevation of a piece of drapery with a hook applied ready for use.

Fig. 3 is a cross sectional detail on the line 3—3 of Fig. 2.

Fig. 4 is a perspective of the drapery hook removed from the drapery.

Referring to the drawings in detail, the drapery hook is made of medium hard wire bent to form the finger 1, the arm 2 extending from one end of the finger 1, the spring coil 3 at the opposite end of the arm 2 from the finger 1, the arm 4 extending from the opposite end of the coil 3 from the arm 2, the bend 5 extending from the upper end

of the arm 4, and the point 6 extending from the opposite end of the bend 5 from the arm 4.

The drapery comprises a body portion 7 of suitable fabric and the hem portion 8 formed by folding the fabric upon itself to make the folded edge 9 and folding the extreme edge of the fabric under to make the folded edge 10 and applying the lines of stitching 11 and 12.

The drapery hook is applied by inserting the point 6 through one thickness of the fabric just above the line of stitching 12 and passing the point between the front layer of fabric 13 and the rear layer of fabric 14 and out through the rear layer of fabric 14 just below the line of stitching 12, so that the rear layer of fabric 14 will pass between the arm 3 and the finger 1, and so that the finger 1 will press the fabric against the arm 4.

Several hooks are applied to a piece of drapery and then the drapery is placed in front of the curtain pole 15 and the hooks are applied by passing the point 6 downwardly over the back of the pole 15.

It should be noted that the drapery hook is not sewed on to the drapery, but is inserted and removed therefrom freely thus dispensing entirely with any sewing.

Various changes may be made without departing from the spirit of my invention as claimed.

I claim:

A drapery hook comprising a piece of spring wire bent intermediate of its ends to form a hook, one of its sides terminating in a point to form a pin, and the other side comprising a shank, a spring coil formed at the end of the shank, an arm extending inwardly from the outer end of the coil toward the bend, the outer end of said arm being bent to form a bearing portion and adapted to rest

resiliently against the shank adjacent to the coil, the arm being disposed between the shank member and the point of the pin.

In testimony whereof I have signed my name to this specification.

H. L. N. P. JAMES W. McGHEE

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks,
Plaintiffs,
vs.
LE SAGE & COMPANY, INC., a corporation,
Defendant.

No. M 27 M
Equity

Defendants' Exhibit J.

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DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the File Wrapper and Contents, in the matter of the Letters Patent of James W. McGhee, Assignor of One-Half to Edward C. Jinks, Number 1,475,306, Granted November 27, 1923, for Improvement in Drapery Hooks.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at

the City of Washington, this thirty-first day of October in the year of our Lord, one thousand nine hundred and twenty-seven and of the Independence of the United States of America the one hundred and fifty-second.

(Seal) Thomas E. Robertson

Attest: Commissioner of Patents.

D. E. Wilson

Chief of Division.

86

1922

590013 (EX'R'S BOOK) ~~205~~ ~~66~~ 60-118-R

DIV. ~~35~~ ~~46~~ 35 PATENT No. 1475306

NOV 27 1923

Name James W. McGhee.

Assor. of ½ to Edward C. Jinks, of Los Angeles, California.

of Los Angeles,

County of ....

State of California.

Invention Drapery Hooks.

ORIGINAL	RENEWED
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Patented ....NOV 27 1923, 192
Attorney Edmund A. Strause, #354 So. Spring St.,
Los Angeles, Calif.

Associate Attorney ....
(No. of Claims Allowed (1) Print Claims............in O. G.
(Cl. 24-86)
Title as Allowed Drapery Hook

2195
Serial No. 590,013
Application

EDMUND A. STRAUSE
Patents, Trade Marks and Designs
Suite 639 Wesley Roberts Building S. W. Cor. Third and Main Streets, Los Angeles, California

PETITION AND POWER OF ATTORNEY

TO THE HONORABLE COMMISSIONER OF PATENTS:

Your Petitioner *- - - - JAMES W. McGHEE - - - - whose P. O. address is 2501 Second Avenue, Los Angeles, California a citizen of the United States, residing at Los Angeles................in the County of Los Angeles.................. and State of California, prays that letters patent may be granted to him................................for the improvement in
- - - - - - DRAPERY HOOKS - - - - - - - -
set forth in the annexed specification, and......he......hereby appoints EDMUND A. STRAUSE, whose register num-
No. 354 South Spring Street
ber is 8052, ~~of 639 Wesley Roberts Building,~~ Los Angeles, California, his............................attorney with full power of

substitution and revocation to prosecute this application, to make alterations and amendments therein, to receive the patent and to transact all business in the PATENT OFFICE connected therewith.

(Sign here) ☞ James W. McGhee

[Cancelled Stamp]

SPECIFICATION

TO ALL WHOM IT MAY CONCERN: 590 1

Be it known that 2196

I, JAMES W. McGHEE, a citizen of the United States, residing at Los Angeles, in the County of Los Angeles, and State of California, have invented new and useful improvements in DRAPERY HOOKS, of which the following is a specification;

My invention relates to drapery hooks, particularly adapted to be detachably secured adjacent the upper edge of a drapery and to engage over a rod, in order that the drapery may be properly hung in place at a window or other opening; and is designed as an improvement on the hook shown and described in the reissue patent entitled DRAPERY HOOKS, bearing number 15263, granted to me Jan. 10th, 1922.

The hook described in the above mentioned patent, although very efficient, has not proven entirely satisfactory, inasmuch as the sharp exposed points on the hook end frequently pricks the fingers of the person handling the drapery, and causing damage to the fabrics by becoming entangled therein; moreover the time consumed in threading the hook through the fabric is objectionable.

It is the object of my present invention to provide a hook for the purpose above described, which will overcome the above recited difficulties and which will be simple, durable, efficient and inexpensive of manufacture, and which may be easily and quickly adjusted to the drapery material.

Another object of my invention is to provide a hook which when secured in position will become yieldingly locked to the drapery material, thus guarding against its becoming accidently displaced therefrom.

The above and other objects of my invention will be more fully disclosed in the following specification, reference being had to the accompanying drawings in which:

Fig. 1 is a back view of the top edge of a fragment of drapery showing the various stages of the application of my improved hook thereto.

590 2
2197

Fig. 2 is a section through the same, taken on the line 2-2 of Fig. 1 viewed in the direction indicated by the arrows.

In carrying out my invention the hook is formed of medium hard and preferably spring wire, went to form the U shaped hook 5 having the arch 6 adapted to engage over a curtain rod, the hook end 7, and the shank portion 8. The wire at the end of the shank 8 is so bent as to form an arm 9 which extends upwardly along the outer edge of the shank and terminates adjacent the arch 6, the bend at the junction of shank 8 and arm 9 forms a spring loop 10 and the end of arm 9 is sharpened to a point 11, said point extending slightly beyond the junction between the shank 8 and the arch 6 as clearly shown in the draw-

ings. The end of the arm 9 just below the point 11 is adapted to normally rest against the shank 8 as shown at 12.

The top portion of a drapery is shown at 13 which comprises a fabric which is folded upon itself and hemmed at 14 to form the adjacent parallel walls 15 and 16, the wall 15 constituting the body of the drapery.

In fig. 1 of the drawings the hook designated by the letter A is shown in a position ready to be inserted into the fabric. By tilting the hook slightly sidewise it will be obvious that the fabric wall 16 may be pierced by the point 11 of arm 9 and the hook pressed upward into the fabric as shown at B, the arm 9 resting between the walls 15 and 16 and the wall 16 being impinged between the arm 9 and shank 8, thus holding the hook yieldingly locked in position to the fabric and thoroughly concealing the arm 9 from view. The hook may then be readily turned to assume the position shown at C and then conveniently placed over the curtain rod.

By the above recited construction it will be apparent that the main weight of the drapery will be supported by the loops 10 of the hooks and that the hemmed portion will be held upwardly by reason of being impinged between the shank 8 and arm 9.

590 3
2198

It will be observed that when the hooks are secured in position on the draperies, that the pointed ends 11 of arm 9 are concealed between the folds of fabric, and consequently all danger of the hooks becoming entangled in the fabric after attachment thereto is obviated.

2199

WHAT I CLAIM IS—

~~1—A drapery hook, comprising a wire bent to form a hook, one side of said hook constituting a shank, and an arm extending along the outer edge of the shank of said hook having a pointed end which terminates adjacent the bend.~~

+ ~~2—A drapery hook, formed of a single piece of wire bent intermediate of its ends into substantially U shaped form, one side of said hook constituting a shank, the end of the shank being bent to form a ∧ ~~spring~~ loop, an arm extending upwardly from the spring loop and disposed adjacent the shank and terminating near the hook bend, the extreme end of the arm being pointed.~~

~~2~~ 3—A drapery hook, formed of a single piece of wire bent intermediate of its ends into substantially U shaped formation to provide an arch, a hook end and a shank portion, the end of the shank portion being bent to form a ∧ spring loop, and an arm extending upwardly from the loop disposed along the outer edge of said shank and terminating adjacent the junction between the shank and arch, the extreme end of the arm being pointed.

~~4—A drapery hook, comprising a single piece of wire bent to form an arch having a hook end and shank portion projecting therefrom, said shank portion having an arm extending along its outer edge, the end thereof terminating approximately at the junction between the arch and shank and yieldingly resting against the shank.~~

2200

In witness that............I claim the foregoing.....................I have hereunto subscribed my..........name..........this 12th day of Sept. ~~12,~~ 1922

James W. McGhee.
INVENTOR.

WITNESSES:

....

....

OATH

STATE OF CALIFORNIA, } ss.
COUNTY OF LOS ANGELES, }

- - - - -*JAMES W. McGHEE - - - - -

the above named petitioner , being duly sworn, deposes and says that he is a citizen of the United States and resident of Los Angeles, in the County of Los Angeles, State of California and that he verily believes himself to be the original, first, and sole inventor of the improvements in

- - - - - DRAPERY HOOKS - - - - -

described and claimed in the annexed specification; that he does not know and does not believe that the same was ever known or used before his invention or discovery thereof; or patented or described in any printed publication in any country before his invention or discovery thereof, or more than two years prior to this application, or in public use or on sale in the United States for more than two years prior to this application; that said invention has not been patented to him or to others with his knowledge or consent in this or any foreign country for more than two years prior to this applicaton, or on an ap-

plication for a patent filed in any country foreign to the United States by him or his legal representatives or assigns more than twelve months prior to his application; and that no application for patent on said improvement has been filed by him or his representatives or assigns in any country foreign to the United States.

(Applicant sign here) ☞ James W. McGhee

Impression seal here

Sworn and subscribed to before me this 13th day of Sept. 1922

(Signature of officer administering oath) Lilah Hollister
Notary Public in and for the County of
Los Angeles, State of California.

590 6

Div. 35 Room 52 2—260 Paper No. 2

Address only "The Commissioner of Patents, Washington, D. C.," and not any official by name.

All communications respecting this application should give the serial number, date of filing, title of invention, and name of the applicant.

St/R DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington March 16, 1923.

[Stamp] Patent Office, Mar 16 1923 Mailed

Edmund A. Strause,
354 South Spring St.,
Los Angeles, California.

Please find below a communication from the EXAMINER in charge of the application of James W. McGhee, #590,013, Sept. 23, 1922, Drapery Hooks.

Thomas E. Robertson
Commissioner of Patents.

6—2631

Case Examined.

The claims 1, 2, 3 and 4, are rejected as being for nothing patentable over British patent:—

Harrison, 5,780, April 28, 1886, one sheet, (24-86).

The clamping action of the pin portion against the part "a" in Figs. 1 and 2 of the reference prevents slipping when fixed in a curtain.

E. C. Reynolds

C. W. S. Examiner, Division 35.

590 7

[Stamp] Mail Room U. S. Patent Office Mar 27 1923

Paper No. 3 Mar 29 1923 Division 35

Los Angeles, Calif. March 22, 1923.

Div. 35, Room 52,

James W. McGhee,

DRAPERY HOOKS

Filed Sept. 23, 1922.

S. N. 590,013

Commissioner of Patents

Sir:—

Examiners letter of March 16, 1923, in the above entitled matter considered: I amend as follows:

Cancel claims 1✓ and 4.✓ Renumber the remaining claims in order.

Claim 1.

Line 4, before "loop" insert—spring—. At the end of the line insert—spring—

Claim 2.

Line 4, before "loop" insert —spring—

REMARKS

Claims 1 and 4 have been cancelled and the invention limited to two specific claims which have been amended to bring out the patentable feature of applicants invention. The claims are now thought to clearly differentiate.

By providing the spring loop 10 on the construction, the arm 9 will be held in yielding engagement with the shank 8, pressing the fabric thereagainst as clearly shown in Fig. 2 of the drawing. The spring loop 10 also has an additional function, to-wit: that of supporting the main weight of the drapery, this also being shown in Fig. 2 and described in the last paragraph of page 2 of applicants specification.

The device in the reference cited does not show a spring loop, in fact no spring action at all as the pin "C" could not have the action of applicants device unless it was provided with a spring loop, the weight of the curtain when it is attached to the device of the reference would tend to pull the arm "C" away from the loop portion "A".

In view of the above it is thought that the case is now in condition for issuance.

Respectfully,

Edmund A. Strause,

EAS:PG Attorney for applicant.

590 8

Div. 35 Room 52 2—260 Paper No. 4

Address only "The Commissioner of Patents, Washington, D. C.," and not any official by name.

All communications respecting this application should give the serial number date of filing, title of invention, and name of the applicant.

St/R DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington April 4, 1923.

[Stamp]: Patent Office, mailed Apr 4—1923.

Edmund A. Strause,
354 South Spring St.,
Los Angeles, California.

Please find below a communicaiton from the EXAMINER in charge of the application of James W.McGhee, #590,013, Sept. 23, 1922, Drapery Hooks.

Thomas E. Robertson
6—2631 Commissioner of Patents.

Reply to Amendment filed March 27, 1923.

Claim 1 is rejected as not patentably distinguished from Harrison, of record. The specification of this reference states that the curtain hook is made of "iron, steel, or metal wire, and as steel is resilient it is thought that the spring action of its parts is disclosed in the reference.

Claim 2 stands allowed.

E. C. Reynolds
C. W. S. Examiner, Division 35.

590 9

Argument: Paper No. ...... Apr 17 1923 Division 35

[Stamp]: Mail Room U. S. Patent Office Apr 16 1923

Los Angeles, Calif. April 9, 1923.

Div. 35, Room 52,
James W. McGhee,
DRAPERY HOOKS
Filed Sept. 23, 1922
S. N. 590,013
Commissioner of Patents
Sir:—

Examiners letter of April 4, 1923, in the above entitled matter considered.

It is thought that claim 1 does patentably distinguish from Harrison for the reason that it calls for a spring loop 10 which forces the pointed end 9 against the shank 8, and also the loop supports the weight of the curtain, as clearly shown in Fig. 2.

While Harrison states that he makes his hook of iron, steel, brass or other metal wire, it is not thought that this conveys the idea of any resiliency in his hook construction. His main object is to provide a hook having a projection "A" to contact with the pin "C" so as to prevent slipping when fixed into the curtain. Secondly, to provide a hook having a projection "B" which contacts with the hook "D" so that it will not slip out of the eye in the pole ring. His two claims clearly describe the functions of his hook, to-wit: "to prevent slipping out of the curtain and out of the eye of the pole ring."

In view of the above it is thought that this case is in condition for issuance.

Respectfully,

Edmund A. Strause
Attorney for Applicant.

EAS:PG

590 10

Div. 35 Room 52 2—260 Paper No. 6

Address only "The Commissioner of Patents, Washington, D. C.," and not any official by name.

All communications respecting this application should give the serial number, date of filing, title of invention, and name of the applicant.

St/R DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE

Washington April 20, 1923.

[Stamp]: Patent Office Mailed Apr 20 1923

Edmund A. Strause,
354 South Spring St.,
Los Angeles, California.

Please find below a communication from the EXAMINER in charge of the application of James W. McGhee, #590,013, Sept. 23, 1922, Drapery Hooks.

Thomas E. Robertson
6—2631 Commissioner of Patents.

Reply to letter filed April 16, 1923.

Claim 1 is again rejected on the reference and for the reason of record.

Claim 2 stands allowed.

E. C. Reynolds
C. W. S. Examiner, Division 35.

590 11

Paper No. 7/B May 1 1923 Division 35

[Stamp]: Mail Room U. S. Patent Office Apr 30 1923

Los Angeles, Calif. April 24, 1923.

Div. 35, Room 52
James W. McGhee,
DRAPERY HOOKS
Filed Sept. 23, 1922
S. N. 590,013
Commissioner of Patents
Sir:—

Examiners letter of April 20, 1923, in the above entitled matter considered: I amend as follows.

Cancel claim 1. Remove the ordinal from the remaining claim.

REMARKS

This places the case in condition for issuance.

Respectfully,

Edmund A. Strause,
Attorney for applicant.

EAS:PG

590 12

Div. 35. 2—181 Serial No. 590,013.

Address only the Commissioner of Patents, Washington, D. C.

[Stamp]: Patent Office, Mailed May 2—1923

R. DEPARTMENT OF THE INTERIOR
UNITED STATES PATENT OFFICE
Washington

James W. McGhee, May Two, 1923.

Sir: Your APPLICATION for a patent for an IMPROVEMENT in Drapery Hook, filed Sept. 23, 1922, has been examined and allowed. 1 Claim

The final fee, TWENTY DOLLARS, must be paid not later than SIX MONTHS from the date of this present notice of allowance. If the final fee be not paid within that period, the patent on this application will be withheld, unless renewed with an additional fee of $20, under the provisions of Section 4897, Revised Statutes.

The office delivers patents upon the day of their date, and on which their term begins to run. The printing, photolithographing, and engrossing of the several patent parts, preparatory to final signing and sealing, will require about four weeks, and such work will not be undertaken until after payment of the necessary fee.

When you send the final fee you will also send, DISTINCTLY AND PLAINLY WRITTEN, the name of the INVENTOR, TITLE OF INVENTION, AND SERIAL NUMBER AS ABOVE GIVEN, DATE OF ALLOWANCE (which is the date of this circular), DATE OF FILING, and, if assigned, the NAMES OF THE ASSIGNEES.

If you desire to have the patent issue to ASSIGNEES, an assignment containing a REQUEST to that effect, together with the FEE for recording the same, must be filed in this office on or before the date of payment of final fee.

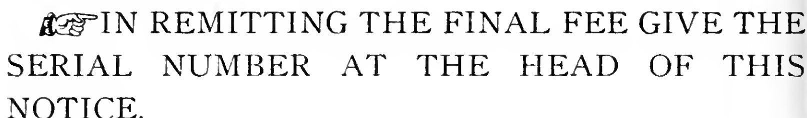
After issue of the patent uncertified copies of the drawings and specifications may be purchased at the price of TEN CENTS EACH. The money should accompany the order. Postage stamps will not be received.

Final fees will NOT be received from other than the applicant, his assignee or attorney, or a party in interest as shown by the records of the Patent Office.

Respectfully.

Thomas E. Robertson
Commissioner of Patents.

Edmund A. Strause,
354 South Spring St.,
Los Angeles, California. 590 13


IN REMITTING THE FINAL FEE GIVE THE SERIAL NUMBER AT THE HEAD OF THIS NOTICE.

UNCERTIFIED CHECKS WILL NOT BE ACCEPTED.

$20 REC'D OCT 27 1923 B

Los Angeles, Calif. Oct. 22, 1923

Commissioner of Patents
Sir:—

Enclosed herewith find Cashiers check of the Citizens National Bank of this city in the amount of $20.00, in payment of the following final government fee.

James W. McGhee, Los Angeles, California
DRAPERY HOOKS
Ser. No. 590,013
Filed Sept. 23, 1922
Allowed May 2, 1923.

Respectfully,

Edmund A. Strause,
Attorney for applicant
590 14

(Photo.)

Nov. 27, 1923. 1,475,306

J. W. McGHEE

DRAPERY HOOK

Filed Sept. 23, 1922

Fig. 1.

Fig. 2.

INVENTOR.

James W. McGhee

BY

Edward A. [illegible]

ATTORNEY.

Patented Nov. 27, 1923. 1,475,306

UNITED STATES PATENT OFFICE.

JAMES W. McGHEE, OF LOS ANGELES, CALIFORNIA, ASSIGNOR OF ONE-HALF TO EDWARD C. JINKS, OF LOS ANGELES, CALIFORNIA.

DRAPERY HOOK.

Application filed September 23, 1922. Serial No. 590,013.

To all whom it may concern:

Be it known that I, JAMES W. MCGHEE, a citizen of the United States, residing at Los Angeles, in the county of Los Angeles and State of California, have invented new and useful Improvements in Drapery Hooks, of which the following is a specification.

My invention relates to drapery hooks, particularly adapted to be detachably secured adjacent the upper edge of a drapery and to engage over a rod, in order that the drapery may be properly hung in place at a window or other opening; and is designed as an improvement on the hook shown and described in the reissue patent entitled Drapery hooks, bearing Number 15263, granted to me Jan. 10th, 1922.

The hook described in the above mentioned patent, although very efficient, has not proven entirely satisfactory, inasmuch as the sharp exposed points on the hook end frequently pricks the fingers of the person handling the drapery, and causing damage to the fabrics by becoming entangled therein; moreover the time consumed in threading the hook through the fabric is objectionable.

It is the object of my present invention to provide a hook for the purpose above described, which will overcome the above recited difficulties and which will be simple, durable, efficient and inexpensive of manufacture, and which may be easily and quickly adjusted to the drapery material.

Another object of my invention is to provide a hook which when secured in position will become yieldingly locked to the drapery material, thus guarding against its becoming accidentally displaced therefrom.

The above and other objects of my invention will be more fully disclosed in the following specification, reference being had to the accompanying drawings in which:

Fig. 1 is a back view of the top edge of a fragment of drapery showing the various stages of the application of my improved hook thereto.

Fig. 2 is a section through the same, taken on the line 2—2 of Fig. 1 viewed in the direction indicated by the arrows.

In carrying out my invention the hook is formed of medium hard and preferably spring wire, bent to form the U shaped hook 5 having the arch 6 adapted to engage over a curtain rod, the hook end 7, and the shank portion 8. The wire at the end of the shank 8 is so bent as to form an arm 9 which extends upwardly along the outer edge of the shank and terminates adjacent the arch 6, the bend at the junction of shank 8 and arm 9 forms a spring loop 10 and the end of arm 9 is sharpened to a point 11, said point extending slightly beyond the junction between the shank 8 and the arch 6 as clearly shown in the drawings. The end of the arm 9 just below the point 11 is

adapted to normally rest against the shank 8 as shown at 12.

The top portion of a drapery is shown at 13 which comprises a fabric which is folded upon itself and hemmed at 14 to form the adjacent parallel walls 15 and 16, the wall 15 constituting the body of the drapery.

In Fig. 1 of the drawings the hook designated by the letter A is shown in a position ready to be inserted into the fabric. By tilting the hook slightly sidewise it will be obvious that the fabric wall 16 may be pierced by the point 11 of arm 9 and the hook pressed upward into the fabric as shown at B, the arm 9 resting between the walls 15 and 16 and the wall 16 being impinged between the arm 9 and shank 8, thus holding the hook yieldingly locked in position to the fabric and thoroughly concealing the arm 9 from view. The hook may then be readily turned to assume the position shown at C and then conveniently placed over the curtain rod.

By the above recited construction it will be apparent that the main weight of the drapery will be supported by the loops 10 of the hooks and that the hemmed portion will be held upwardly by reason of being impinged between the shank 8 and arm 9.

It will be observed that when the hooks are secured in position on the draperies, that the pointed ends 11 of arm 9 are concealed between the folds of fabric, and consequently all danger of the hooks becoming entangled in the fabric after attachment thereto is obviated.

What I claim is—

A drapery hook, formed of a single piece of wire bent intermediate of its ends into substantially U shaped formation to provide an arch, a hook end and a shank

portion, the end of the shank portion being bent to form a spring loop, and an arm extending upwardly from the loop disposed along the outer edge of said shank and terminating adjacent the junction between the shank and arch, the extreme end of the arm being pointed.

In witness that I claim the foregoing I have hereunto subscribed my name this 12th day of Sept. 1922.

JAMES W. McGHEE.

2—421

10/9/23 1922

CONTENTS:

1.	Application....V....papers.	26.	....
2.	Rej March 16/23	27.	....
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23.	....	48.	....
24.	....	49.	....
25.	....	50.	....

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks, Plaintiffs,	
vs.	H. L. N. P. No. M 27 M Equity
LE SAGE & COMPANY, INC., a corporation, Defendant.	

Defendants' Exhibit K (attached to New York depositions.)

390

DEPARTMENT OF COMMERCE

UNITED STATES PATENT OFFICE

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Provisional Specification, Complete Specification and Drawing, in the matter of the British Letters Patent to George Frederick French, Alfred French and Anne Jane Prest,

Dated December 16, 1912, Number 28,885,

for Improvements in Curtain Hooks and the like.

Copy of said Patent having been received in this Office January 5, 1914.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-sixth day of October in the year of our Lord, one thousand nine hundred and twenty-seven and of the Independence of the United States of America the one hundred and fifty-second.

(Seal) Thomas E. Robertson

ATTEST: Commissioner of Patents.

D. E. Wilson

Chief of Division.

No. 28,885 [Emblem] A. D. 1912

[Stamp]: Library U. S. Patent Office Jan 5 1914

Date of Application, 16th Dec., 1912

Complete Specification Left, 16th June, 1913—Accepted, 27th Nov., 1913

PROVISIONAL SPECIFICATION.

Improvements in Curtain Hooks and the like.

We, GEORGE FREDERICK FRENCH, ALFRED FRENCH and ANNE JANE PREST, trading as Thomas French and Sons, of Lower Moss Lane, Chester Road, Manchester, Smallware Manufacturers, and WILLIAM HENRY PINCH, of 20, Alderley Avenue, Claughton Village, Birkenhead, Manufacturer, do hereby declare the nature of the said invention to be as follows:—

This invention refers to and consists of an improved construction of hook for use generally with casement cur-

tains and the like, and in particular with curtains fitted with a gathering tape of the kind forming the subject of Letters Patent No. 7141 A. D. 1906.

According to the invention, the improved hook is made of a single length of wire so bent as to produce a "hook" part, a "pin" part and a "cross" part, this latter being preferably in the form of two small loops. The "pin" part (which is formed by one end of the wire) is of a length suitable for piercing the tape near its lower edge, and, after passing behind the tape, again piercing it near the upper edge, the pointed end lying in front of the tape. The "hook" part (which is formed by the other end of the wire) has a straight part similar in length to that of the pin part, and such straight part of the hook lies in front of and parallel with the pin part.

The said "cross" part of the improved hook is produced by the central portion of the length of wire being formed into loops. When the hook is applied to a tape the said loops lie practically flat against the curtain and their relationship to the hook part is such that they hold the hook in a plane at right angles to the face of the tape.

The advantages of the improved hook are, that it engages the tape vertically and thus allows of the hooks lying closer together than the ordinary safety pin hooks, and of the curtain being thus more effectively supported; its "hook" part always stands out from the face of the tape and does not fall to right or left, thus facilitating the engaging of the hooks with the rings on the curtain pole; and lastly, the improved hook is easily and cheaply produced. Other advantages are that the "hook" part forms a handle for inserting or withdrawing the pin part, and

the loops form a "stop" for limiting the extent to which the pin enters the tape.

That part of the wire extending from one loop to the other may pass behind, or between, or in front of the two parallel parts of the wire. Instead of two loops there may be one wide loop only, or instead of a loop or loops, the wire may be bent to form lateral lugs or ears. Further the loops, lugs or ears may be at other than the lower part of the hook.

To provide against accidental disconnection of the hook

[Price 8d.]

from the tape, the straight stem part of the "hook" may be bent to form a "catch" with which the pin may be engaged after passing through the tape.

Dated this 14th day of December, 1912.

For the Applicants,
JOHN G. WILSON & Co.,
Chartered Patent Agents,
55 Market Street, Manchester.

COMPLETE SPECIFICATION.

Improvements in Curtain Hooks and the like.

We, GEORGE FREDERICK FRENCH, ALFRED FRENCH and ANNE JANE PREST, trading as Thomas French and Sons, of Lower Moss Lane, Chester Road, Manchester, Smallware Manufacturers, and WILLIAM HENRY PINCH, of 20, Alderley Avenue, Claughton Village, Birkenhead, Manufacturer, do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

This invention refers to and consists of an improved construction of hook for use generally with casement curtains and the like, and in particular with curtains fitted with a gathering tape of the kind forming the subject of Letters Patent No. 7141 A. D. 1906.

Upon the accompanying drawing,

Fig. 1 illustrates (to an enlarged scale) a side elevation of the improved hook.

Fig. 2 illustrates a front view, whilst

Fig. 3 illustrates a sectional plan on line x—x.

Figs. 4 and 5 illustrate the application of the improved hook to a curtain.

Fig. 6 illustrates a side elevation, and

Figs. 7 and 8 front views of modifications, whilst

Fig. 9 illustrates a side view (in part) of a further modification.

According to the invention, the improved hook is made of a single length of wire so bent as to produce a "hook" part *a*, a "pin" part *b*, and a "cross" part *c*, this latter being preferably in the form of two small loops. The pin part *b* (which is formed by one end of the wire) is of a length suitable for piercing the tape near its lower edge and, after passing behind the tape, again piercing it near the upper edge, the pointed end lying in front of the tape, see Figs. 4 and 5. With eyeletted tapes, the pin part *b* may be blunt.

The rear or stem portion of the hook part *a* is either straight like the pin, or, as shown, is formed with two small "humps" or corrugations a^1, a^2 which, when the hook is applied to the gathering tape aforesaid, allow room for those parts of the tape containing the draw cords, see Fig. 3. They also help in securing the hook to the tape.

The said "cross" part *c* of the improved hook is produced by the central portion of the length of wire being formed into loops. That part of the wire extending from one loop to the other may pass behind, or as shown, between, or in front of the two rear vertical parts of the wire. In forming the loops they are, preferably, arched transversely so as to ensure of the pin part *b* and the outer parts of the loops lying in the same plane, or in line with each other, see Fig. 3, and therefore when the hook is applied to a tape the loops cause the hook part *a* to lie in a plane at right angles to the face of the tape, see Figs. 5 and 6. The loops also act as springs for the pin, and cause the tape to be clipped between the pin and stem of hook except where the draw cords come, which are left free.

No. 28,885.—A. D. 1912. 3

Improvements in Curtain Hooks and the like.

After being applied to the tape and with the curtain ready pleated, the hooks are passed through the usual curtain rod rings as shown dotted in Fig. 5. For enabling the hooks to be used with ordinary curtain rods without rings, the part *a* may be made to the form of a ring, see Fig. 6, the curtain rod passing through the ring.

The advantages of the improved hook are that it engages the tape vertically and thus allows of the hooks lying closer together than the ordinary safety pin hooks and of the curtain being thus more effectively supported; its hook part always stands out perpendicularly from the face of the tape and does not move to right or left, thus facilitating the engaging of the hook with the ring on the curtain pole; and further, the improved hook is easily and cheaply produced.

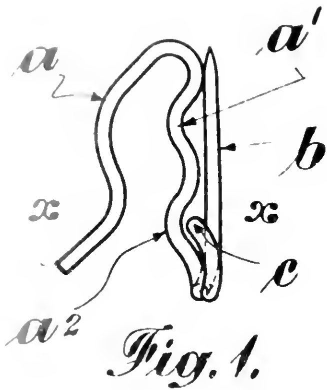


Fig. 1.

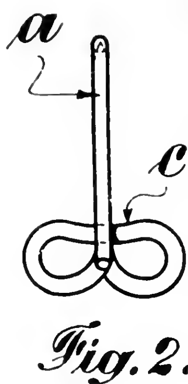


Fig. 2.

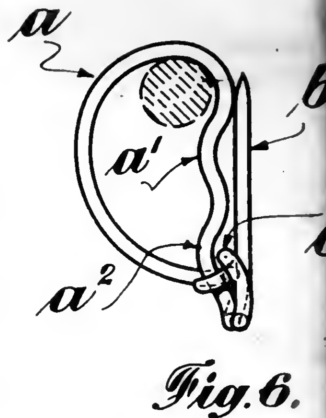


Fig. 6.

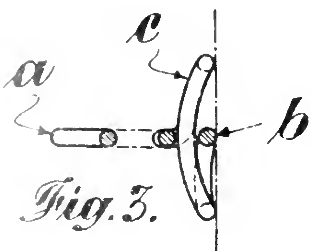


Fig. 3.

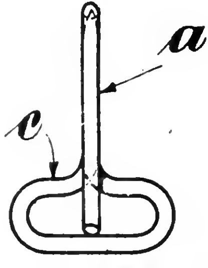


Fig. 7.

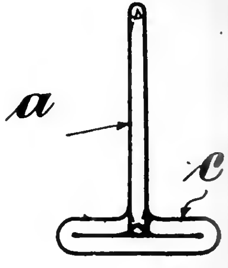


Fig.

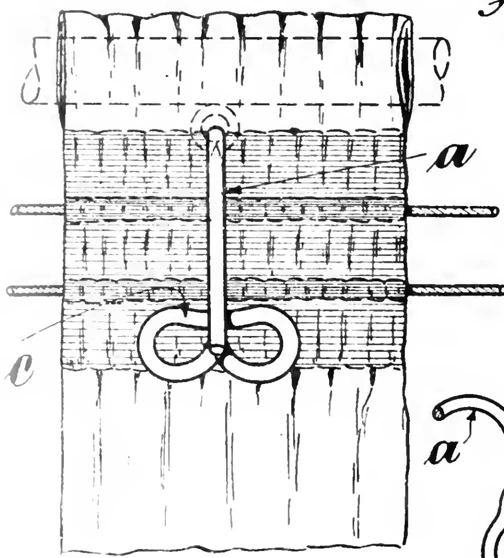
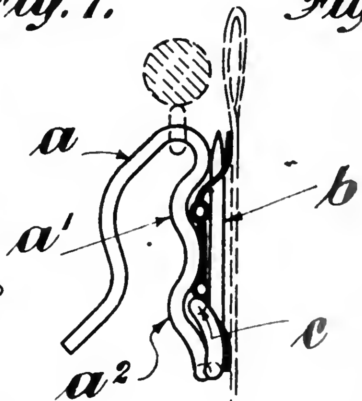


Fig. 4.



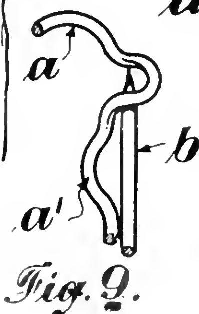


Fig. 9.

Fig. 5.

[This Drawing is a reproduction of the Original on a reduced scale]

Malby & Sons, Photo-

Other advantages are that the hook part forms a handle for inserting or withdrawing the pin part, and the top of the loops forms a "stop" for determining the extent to which the pin may pass through the tape.

Instead of two loops, there may be one wide loop, see Fig. 7, or, instead of an open loop or loops, the wire may be bent to form closed loops, lugs or spurs, see Fig. 8.

To provide against accidental disconnection of the hook from the tape, the stem part of the hook may be bent to form a "catch" with which the pin may be engaged after passing through the tape, see Fig. 9.

Having now particularly described and ascertained the nature of the said invention and in what manner the same is to be performed, we declare that what we claim is:—

1. A curtain hook or the like formed from one piece of wire and comprising the hook (or ring) part *a,* the "pin" part *b* and the spring cross part *c,* substantially as herein set forth.

2. A curtain hook or the like with a pin part and with spring loops, lugs or spurs lying to right and left of the "pin" part and in a plane at right angles to the plane of the hook proper, substantially as herein set forth.

3. A curtain hook or the like, constructed substantially as herein described and illustrated in Figs. 1 to 3 (or 6, 7, 8 or 9) of the accompanying drawing.

Dated this 12th day of June, 1913.

For the Applicants,
JOHN G. WILSON & Co.,
Chartered Patent Agents,
55, Market Street, Manchester, and at Blackburn.

Redhill: Printed for His Majesty's Stationery Office, by Love & Malcomson, Ltd.—1913.

(Photo.)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks, Plaintiffs,	H. L.
vs.	N. P.
LE SAGE & COMPANY, INC., a corporation, Defendant.	No. M 27 M Equity.

Defendants' Exhibit L attached to New York Depositions

390

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Provisional Specification, Complete Specification and Drawing, in the matter of the British Letters Patent to Henry Charles Harrison,

Dated April 28, 1886, Number 5,780,
for Improvements in the Manufacture of Curtain Hooks. Copy of said Patent having been received in this Office June 11, 1887.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-sixth day of October in the year of our Lord, one thousand nine

hundred and twenty-seven and of the Independence of the United States of America the one hundred and fifty-second.

(Seal) Thomas E. Robertson

ATTEST: Commissioner of Patents.

D. E. Wilson

Chief of Division.

[Stamp]: Library U. S. Patent Office, Received Jun 11 1887

Date of Application, 28th Apr., 1886

Complete Left, 28th Jan., 1887

Complete Accepted, 1st Mar., 1887

A. D. 1886, 28th April. No. 5780.

PROVISIONAL SPECIFICATION.

Improvements in the Manufacture of Curtain Hooks.

HENRY CHARLES HARRISON 70 Princess Road, Edgbaston, Birmingham, Clerk & Traveller do hereby declare the nature of this invention to be as follows:—

I first take a piece of Iron, Steel, or metal wire, of any section but round preferred, say about six inches in length & pointed at one end, & bend it into shape similar to the letter S but the ends projecting more—In the centre, or what may be termed the backbone of the Hook, the wire is bent to form a half round projection back & front, & when complete is represented in accompanying sketch. The object of the projection A is for the Pin C to press against & so prevent it slipping when fixed into the curtain & so do away with the old safety pin arrangement—

The object of the projection B is for the Hook D to press against so that when the latter is passed through the eye in the pole ring it does not readily slip out. The Hooks made as above also bear a greater strain than the old fashioned safety Pin Curtain Hook.

HENRY CHARLES HARRISON.

[Price 6*d.*]

Complete
2 A. D. 1886.—No 5780. Specification.

Harrison's Improvements in the Manufacture of Curtain Hooks.

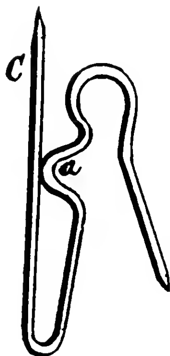
COMPLETE SPECIFICATION.

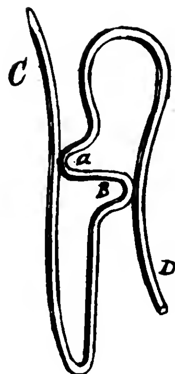
Improvements in the Manufacture of Curtain Hooks.

HENRY CHARLES HARRISON, 70 Princess Road, Edgbaston, Birmingham, Clerk & Traveller, do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

I first take a piece of Iron, Steel, Brass or other metal wire of any section but round preferred, say about six inches in length, & pointed at one end, and bend it into shape similar to the letter S but the ends projecting more—In the centre or what may be termed the backbone of the hook, the wire is bent to form a half round projection back & front and when complete is represented in the accompanying drawing No. 1.

The object of the projection A is for the pin C to press against & so prevent it slipping when fixed into the curtain, and so do away with the old safety pin arrangement.





London: Printed by Darling and Son
for Her Majesty's Stationery Office. 1887.
Malby & Sons, Phot

The object of the projection B is for the hook D to press against so that when the latter is passed through the eye in the Pole Ring it does not readily slip out. I also purpose making them with the projection A only as per drawing No. 2.

Having now particularly described and ascertained the nature of my said Invention, and in what manner the same is to be performed, I declare that what I claim is

1st. Having the projection A to prevent the hook slipping out of the curtain, & to support same.

2nd. Having the projection B to prevent it slipping out of the eye in the Pole Ring.

HENRY CHARLES HARRISON.

LONDON: Printed by DARLING & SON.
For Her Majesty's Stationery Office.

1887.

(Photo.)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks, Plaintiffs,	H. L.
vs.	N. P.
LE SAGE & COMPANY, INC., a corporation, Defendant.	No. M 27 M Equity.

Defendants' Exhibit M attached to New York Depositions.

390

DEPARTMENT OF COMMERCE
UNITED STATES PATENT OFFICE

To all persons to whom these presents shall come, Greeting:

THIS IS TO CERTIFY that the annexed is a true copy from the records of this office of the Provisional Specification, Complete Specification and Drawing, in the matter of the British Letters Patent to Anne Timmis,

Dated June 23, 1910, Serial Number 15,079,

for Improvements in the Method of and Means Employed for Hanging Curtains.

Copy of said Patent having been received in this Office August 7, 1911.

IN TESTIMONY WHEREOF I have hereunto set my hand and caused the seal of the Patent Office to be affixed, at the City of Washington, this twenty-sixth day of

October in the year of our Lord, one thousand nine hundred and twenty-seven and of the Independence of the United States of America the one hundred and fifty-second.

(Seal) Thomas E. Robertson

ATTEST: Commissioner of Patents.

D. E. Wilson

Chief of Division.

No. 15,079 [Emblem] A. D. 1910

[Stamp]: Aug. 7 1911.

Date of Application, 23rd June, 1910

Complete Specification Left, 22nd Dec., 1910—Accepted, 26th June, 1911

[Stamp] Library U. S. Patent Office Aug 7 1911

PROVISIONAL SPECIFICATION.

Improvements in the Method of and Means Employed for Hanging Curtains.

I, ANNE TIMMIS, of 10, Northumberland Avenue, Bispham, near Blackpool, in the County of Lancaster, Married Woman, do hereby declare the nature of this invention to be as follows:—

This invention relates to improvements in the method of and means employed for hanging or suspending curtains from curtain poles or rods the object being to facilitate the operation of hanging or removing and to prevent damage being done to the curtain itself or to reduce the wear and tear as much as possible.

The invention comprises a novel construction of tape or band with loops or attachments to be stitched to the curtains the loops or attachments providing means whereby the curtain can be affixed to combined hooks and curtain pole rings or like devices carried on the curtain pole or rod.

According to this invention there is sewn to the edge of the curtain a suspending tape comprising a broad tape with a narrower tape sewn on to one face of it in the form of a series of loops eyes or pockets or ends for tying so that when sewn onto the curtain the latter is furnished with a series of loops or eyes or means of attachment of the curtain to the pole rings or hooks.

The poles rings or hooks are made in the form of hooks with one long shank and one shorter one terminating in an eye loop or enlargement with or without an eye or in a forked or bifurcated end or otherwise shaped so that when the longer shank is passed through one of the loops or eyes on the curtain the loop or enlargements constitutes a holding device and the hook and curtain are united. The hook is then placed on the curtain pole or rod or it may be hooked onto the ordinary pole ring. The longer shank of the hook may be bent or curved round so that the hoop becomes a ring with open or split ends to allow for its being passed through one or other of the loops on the curtain and so affixed thereto and in order to maintain the hook or ring in correct position when on the pole and when in ring form a depression is preferably formed in the ring or hook or it is slightly angled so that the weight of the curtain keeps the loop at the bottom of the depression. The curtain may be tied to the hooks or rings by the ends and the ring or curved hook may be provided with an eye for this purpose.

Instead of the loops or ends for securing the curtain to the hook or rings eyelets may be formed in the tape and hooks or rings passed through them.

The shorter shank of the hook may be doubled or bent on itself and the loop on the tape passed between the bent or folded portions and the end of the folded portion of the shank received in a pocket or slot stitched on the edge of the curtain or on the tape on same.

Dated this 21st day of June, 1910.

BRIERLEY & HOWARD,
Halifax & Blackburn,
Agents for the Applicant.

[Price 8*d.*]

2 No. 15,079.—A. D. 1910.

Improvements in the Method of and Means Employed for Hanging Curtains.

COMPLETE SPECIFICATION.

Improvements in the Method of and Means Employed for Hanging Curtains.

I, Anne Timmis, of 10, Northumberland Avenue, Bispham, near Blackpool, in the County of Lancaster, Married Woman, do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

This invention relates to a curtain suspension device of the kind in which a tape or band with loops or attachments is stitched to the curtain, the loops or attachments providing means whereby the curtain can be affixed to hooks, curtain pole rings or like devices for connection with the curtain pole or rod.

The present invention consists in forming the hook or ring with an eye for the reception of thread by means of which the hook or ring can be stitched to the curtain tape, the said eye being situated in proximity to a loop or other holding device forming part of the hook or ring.

In order that the said invention may be clearly understood and readily carried into effect, the same is described with reference to the accompanying drawings, in which:—

Figure 1 is an elevation shewing a portion of a curtain and pole with hooks and tapes in position.

Figures 2 to 8 are elevations of various styles of hooks.

1 indicates the curtain, 2 the suspending tape and 3 the tape that is sewn onto one face of the tape 2 in the form of a series of loops, eyes, pockets or ends 4 for tying which serve as a means of attachment of the curtain 1 to the pole rings or hooks 5 which may be constructed in any suitable manner. In the example shewn in Figs. 5 and 6, each of the hooks is formed with a long shank and a shorter one terminating in an eye or loop 6 in a similar manner to that which has already been proposed the eye 10 for stitching purposes being situated in proximity to such loop or to a head or bar 8 extending transversely across the end of the shank as shewn in Figures 1, 2, 3, and 4 which serves as a device for uniting the hook 5 and curtain 1. The hook 5 may be placed on the curtain pole or rod 7 or it may be hooked onto the ordinary pole ring. The longer shank of the hook may be bent or curved round (see Figs. 7 and 8) in a manner that has already been proposed so that the hook becomes a ring with open or split ends to allow for its being passed through one or other of the loops 4 on the curtain 1 and so affixed thereto in order to maintain the

FIG. 1

FIG. 2

FIG. 3

FIG. 4

FIG. 5

FIG. 6

FIG. 7

FIG. 8

[This Drawing is a reproduction of the Original on a reduced scale]

hook or ring 5 in correct position when on the pole, and when in ring form a depression 9 is preferably formed in the ring or hook or it is slightly angled so that the weight of the curtain keeps the loop 4 at the bottom of the depression 9. The curtain may be tied to the hooks or rings 5 by the aforesaid ends, the eyes 10 being provided for the purpose of stitching the hooks or rings to the tape.

The shank of the hook 5 may be doubled or bent on itself as in Fig. 6 and the loop on the tape passed between the bent or folded portions and the end of the folded portion of the shank received in a loop 11 stitched on the edge of the curtain or on the tape thereon.

Having now particularly described and ascertained the nature of my said invention and in what manner the same is to be performed, I declare that what I claim is: —

1. The means described comprising hooks having an eye 10 formed in the hook or ring for the purpose specified substantially as described and illustrated by the annexed drawings.

Improvements in the Method of and Means Employed for Hanging Curtains.

2. For use in combination with a curtain suspension device of the kind set forth, a hook constructed and arranged substantially as hereinbefore described with reference to any of the examples illustrated in the accompanying drawings for the purpose specified.

Dated this 20th day of December, 1910.

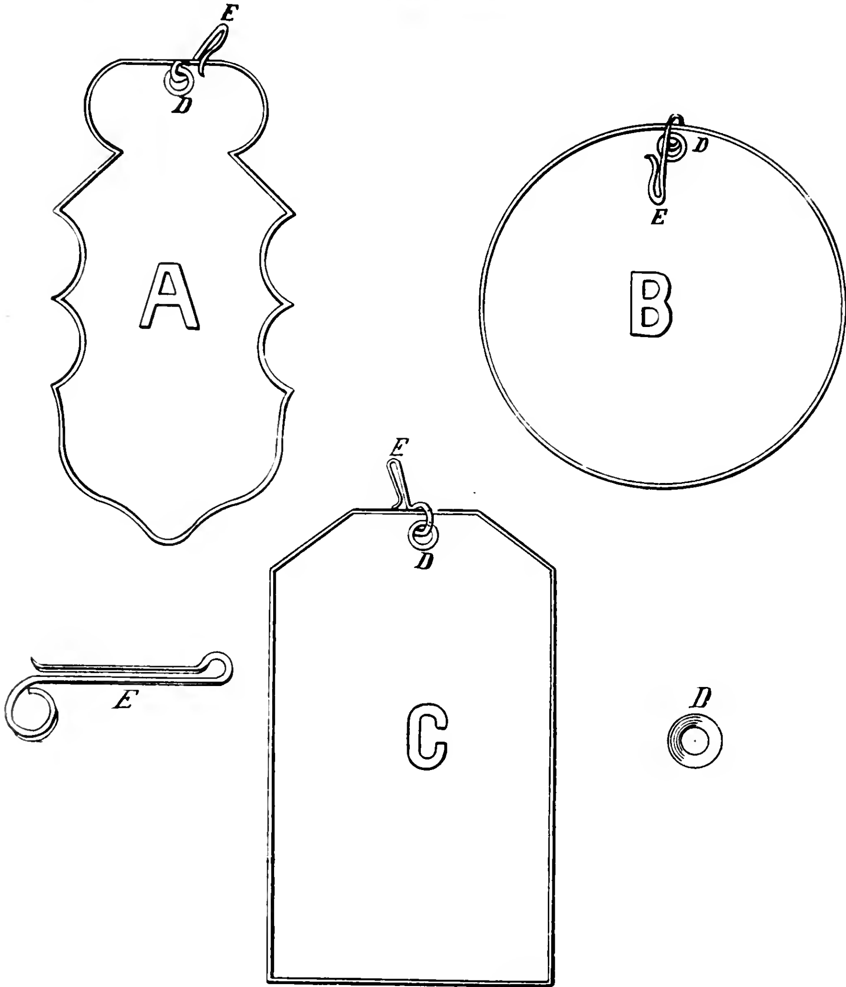
BRIERLEY & HOWARD,
Halifax & Blackburn,
Agents for the Applicant.

Redhill: Printed for His Majesty's Stationery Office, by Love & Malcomson, Ltd.—1911.

Fay
15,226
July 1, 18

S. B. Fay.
Hook Tag.

No. 15,226. Patented Jul. 1, 1856.



Witnesses
G. C. Bissell
John Bissell

Inventor
Samuel B. Fay

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks, Plaintiffs,	
vs.	H. L. N. P. No. M *27* M Equity.
LE SAGE & COMPANY, INC., a corporation, Defendant.	

DEFENDANTS' EXHIBIT N, Prior Art Patents.
(Attached to New York Depositions)

UNITED STATES PATENT OFFICE.
SAMUEL B. FAY, OF NEW YORK, N. Y.

METALLIC HOOK FOR LABELS.

Specification of Letters Patent No. 15,226, dated July 1, 1856.

To all whom it may concern:

Be it known that I, SAMUEL B. FAY, of the city, county, and State of New York, have invented a new and useful Mode of Attaching Tags or Labels; and I do hereby declare the following to be a full, clear, and exact description thereof, reference being had to the accompanying drawing, in which my improvement is illustrated.

In large warehouses requiring an extensive mode of labeling cloths and other articles the usual methods em-

ployed of tying tags to the cloth or riveting on lead tags is very laborious often requiring the time of several persons.

To remedy this defect my invention was made.

For the above purpose several requisites must be attained; first, the article must be sufficiently cheap; secondly, it must be affixed in such a manner as not to be easily detached in handling the goods and, thirdly, it must be affixed easily, rapidly and surely.

I thus attain all these requisites. The tag or label is made of card or other cheap suitable material cut to any pattern as seen in the drawing at A, B, C. Holes are cut in these tags and a metallic eyelet or gromet D is inserted therein. Then I prepare a hook as shown at E, in the drawing, formed of suitable metal or in any other form or configuration having the same characteristics of a sharp point bent into position to be readily caught in the cloth with the parts of the shank brought together in such a way as to require them to spring open to pass that portion of the article to which the tag is to be affixed which has been caught by the hook and after it is passed to close again so as to retain the same beyond the point above named where the parts of the shank are made to appear there should be a bow or bight sufficient to retain the portion above named into which the hook is set. In this way tags and labels may be affixed to goods with sufficient permanence for all practical purposes and with infinitely less labor than when pinned, sewed, or tied thereto by a string as are the methods now employed for that purpose.

Having thus fully described my improved tag or label and its difference from what has heretofore been essayed

therein what I claim as my device for which I desire Letters Patent is—

The construction of tags or labels substantially as herein described by affixing thereto a hook so formed as to readily hook into the goods to be marked and by the spring of the shank retain its position without being liable to become readily detached as herein specified.

SAMUEL B. FAY.

Witnesses:

GEO. H. BISSELL,

JOHN BISSELL.

(No Model.)

D. B. GUNN.

COMBINED COLLAR AND NECKTIE RETAINER.

No. 303,370. Patented Aug. 12, 1884.

Fig 1

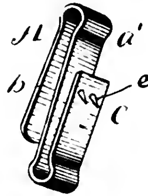
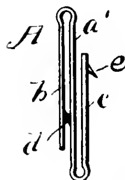


Fig 2.

Fig. 3.



WITNESSES:

W. E. Bowen

Wm. McKheem.

INVENTOR

Daniel B. Gunn

BY

Frank Sheehy

ATTORNEY

UNITED STATES PATENT OFFICE.

DANIEL B. GUNN, OF RED OAK, IOWA.

COMBINED COLLAR AND NECKTIE RETAINER.

SPECIFICATION forming part of Letters Patent No. 303,370, dated August 12, 1884.

Application filed March 3, 1884. (No Model.)

To all whom it may concern:

Be it known that I, DANIEL B. GUNN, a citizen of the United States, residing at Red Oak, in the county of Montgomery and State of Iowa, have invented certain new and useful Improvements in Combined Collar and Necktie

Retainers, of which the following is a specification, reference being had therein to the accompanying drawings.

This invention has relation to improvements in devices for retaining neckties and neck-scarfs in proper place upon collars and the collar in proper position with relation to the shirt-band and tie or scarf.

The invention consists in the combination and arrangement, in connection with a strip of suitable material having loop-arms, of pins for the engagement of the shirt-band and tie-band, as will be hereinafter more fully set forth, and particularly pointed out in claim appended.

Referring by letter to the accompanying drawings, to which similar letters of reference are made indicating corresponding parts, Figure 1 is a representation of a perspective of my device, showing the pins on the inner and outer arms. Fig. 2 is a side view of the same, showing it applied to a portion of a shirt-band, collar, and tie, and Fig. 3 is a side view showing the pins on a middle and outer arms.

In the said drawings, A indicates the fastener; B, the shirt-band; C, the collar, and D the tie or scarf. The fastener is formed from a flat strip of metal, which may be brass or other metal of a semi-elastic or spring nature, and is bent to form a middle vertical arm, *a'*, and an inner and outer arm, *b c*, of about equal length. The middle arm, *a'*, is perfectly plain on its side next to the arm *c*, and has its inner side, or the side adjacent to the arm *b*, provided with a pin, *d*, which inclines upwardly toward the inner arm; or the inner arm, *b*, may be provided on its inner lower side with one or more similar pins, which extend obliquely or incline downwardly from the said middle arm, and are designed to engage the inner surface of a

shirt-bosom or its collar-band. The outer arm, *c*, extends upwardly and is provided on its outer side with one or more pins, *e*, which incline downwardly and are designed to engage the tie or scarf upon the collar. The arms of the loops may be made large at their bends, as shown, so as to increase their spring action in engaging the articles.

From the foregoing description the operation and advantages of my invention will be obvious. It will be seen that when the device is in place on a shirt-collar band, the collar brought between the outer and middle arms, and the tie-band brought into its normal position around the collar, both the collar and tie will be securely held together upon the shirt and the former prevented from moving out of place.

The fasteners or retainers may be either gold or silver plated, and thus made to present a handsome appearance; or they may be made of celluloid at a very small expense.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent, is—

As an improved article of manufacture, a combined collar and necktie retainer formed from a strip of suitable material, having a middle arm, *a'*, provided with a reverse loop-arm, *b* and *c*, at opposite ends on opposite sides, the middle arm having pins on its side next to the arm *b*, and the outer arm, *c*, having pins on its outer side, the pins of the respective arms being inclined, substantially as shown and described.

In testimony whereof I affix my signature in presence of two witnesses.

DANN. B. GUNN.

Witnesses:

M. S. Evans,
Chas. Turney.

(No Model.)

M. RIGGS.

EYEGLASS HOLDER.

No. 392,363. Patented Nov. 6, 1888.

Fig. 1.

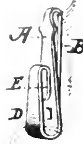


Fig. 2.

Fig. 3.

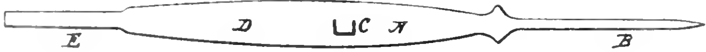


Fig. 4.

WITNESSES:
Gustave Dieterich
W. A. C. Matthie

INVENTOR.
Miles Riggs
BY
Chas. C. Gill
ATTORNEY.

N. PETERS. Photo-Lithographer. Washington, D. C.

UNITED STATES PATENT OFFICE.

MILES RIGGS, OF NEW YORK, N. Y.

EYEGLASS-HOLDER.

SPECIFICATION forming part of Letters Patent No. 392,363, dated November 6, 1888.

Application filed June 14, 1888. Serial No. 277,109. (No model.)

To all whom it may concern:

Be it known that I, MILES RIGGS, a citizen of the United States, and a resident of New York, in the county of New York and State of New York, have invented certain new and useful Improvements in Eyeglass-Holders, of which the following is a specification.

The invention relates to improvements in eyeglass-holders; and it consists in a holder made from a single piece of sheet metal, with a suitable spring-holding hook on the outside of a backing-plate, and a pin and catch on the opposite side of said plate, the whole being adapted to be attached to the vest or other garment.

The particular characteristics of the invention sought to be protected will be understood from the detailed description hereinafter presented, reference being had to the accompanying drawings, in which—.

Figure 1 is a perspective view of the holder sustaining a pair of eyeglasses, the latter being illustrated by dotted lines. Fig. 2 is an enlarged side elevation of the holder. Fig. 3 is a plan view of the blank from which the holder is formed, the same being stamped from sheet metal in a single piece; and Fig. 4 is a perspective view looking down upon the upper end of the holder.

In the drawings, A designates the backing-plate of the holder; B, the pin by which it may be secured to the vest or other garment of the user; C, the catch for retaining the free end of the pin B; and D, the hook for sustaining the eyeglass, said hook being formed by turning the metal upward and its spring E inward and downward in close relation to the backing-plate A, as illustrated in Figs. 1 and 2.

It will be observed that the metal at the lower end of the hook D is not reduced in width and is not intended for a spring, all of the spring qualities of this part of the device being in the reduced end E. Heretofore in the construction of this class of eyeglass-holders the hook D has been so formed as to constitute a spring, and in thus constructing it the metal at its lower end has necessarily been reduced and weakened, the effect of which being that the hook frequently became broken from the backing-plate by reason of the coat rubbing against it, or by being caught or moved against some object handled by the user.

To correct this difficulty is one of the objects of my invention, and in the accomplishment of which I construct the hook D of considerable strength at its lower end, causing it to be a rigid fixture instead of a spring. It is desirable, however, that a spring be provided in order to prevent the too easy escape of the eyeglass from the holder, and hence I form the individual spring E at the upper end of the hook D. This spring lightly impinges the backing-plate A, and has its lower extremity turned toward the hook in order to facilitate the removal of the eyeglass when desired.

By reference to Figs. 3 and 4 it will be seen that the spring E is formed by making that portion of the metal

of which it is composed more narrow than the remaining portions, and this may be done without detriment to the durability of the article, since it is protected when in use between the rigid backing-plate A and the rigid hook D, where it is only permitted to have a limited movement and is in no danger of being straightened out or broken. The pin B is also made from the same blank from which the remaining parts of the holder are constructed, and is turned downward in line with the backing-plate A, a catch, C, being stamped out of the sheet metal at a point opposite to the lower end of the pin for the purpose of retaining the latter after the holder has been applied to the vest or other garment.

The holder, being made wholly from one piece of sheet metal and constructed as described, is very simple and inexpensive, and at the same time durable and entirely safe.

What I claim as my invention, and desire to secure by Letters Patent, is—

The eyeglass-holder hereinbefore described, having the backing-plate A, the attaching-pin on one side of said plate, the rigid hook D, turned upward from the lower end of said plate and on the opposite side from said pin, and the spring E, passing downward from the upper end of the rigid hook D, in close relation to the face of the backing-plate A, said spring being protected between the rigid hook and the backing-plate, substantially as and for the purposes set forth.

Signed at New York, in the county of New York and State of New York, this 8th day of June, A. D. 1888.

MILES RIGGS.

Witnesses:

C. M. Lee,

Chas. C. Gill.

(No Model.)

E. H. NASH.

CATCH PIN.

No. 404,102. Patented May 28, 1889.

Fig. 1.

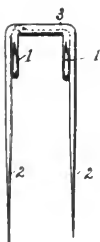


Fig. 2.

Fig. 3.

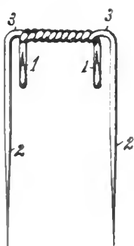


Fig. 4.

Fig. 5.

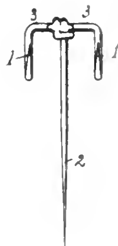


Fig. 6.

Witnesses
C. M. Newman,
Etta F. Pettit.

Inventor
Edward H. Nash
By A. M. Wooster
Atty.

UNITED STATES PATENT OFFICE.

EDWARD H. NASH, OF WESTPORT, CONNECTICUT, ASSIGNOR TO LLOYD NASH AND ELBERT N. SIPPERLEY, OF SAME PLACE.

CATCH-PIN.

SPECIFICATION forming part of Letters Patent No. 404,102, dated May 28, 1889.

Application filed January 8, 1889. Serial No. 295,757. (No model.)

To all whom it may concern:

Be it known that I, Edward H. Nash, a citizen of the United States, residing at Westport, in the county of Fairfield and State of Connecticut, have invented certain new and useful Improvements in Catch-Pins; and I do hereby declare the following to be a full, clear and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

My invention has for its object to produce a pin adapted to hold ladies' work in sewing, which may be readily attached to the dress or to any textile material—as, for example, to an upholstered chair or sofa or to a table-cover. In other words, the object is to produce a pin of this class adapted for general use which may be produced at very slight cost, so that it may be retailed for a few pennies, thus placing it within the reach of all, and which will perfectly perform the functions of the more expensive pins, sewing-birds, &c., which have heretofore been produced. With these ends in view I have devised the simple and novel construction, of which the following description,

in connection with the accompanying drawings, is a specification.

Figures 1, 3 and 5 are front elevations of different forms in which I have carried my invention into effect. Figs. 2 and 4 are end views corresponding, respectively, with Figs. 1 and 3; and Fig. 6 is a side view of a form having but one supporting-point and one attaching-shank.

An important feature of my invention, as illustrated in the first five figures of the drawings, lies in giving to the work to be sewed or otherwise operated upon two points of support, which will be found especially valuable for many kinds of work, as it prevents the possibility of tearing the work and supports it in a much firmer and better manner. In addition to the supporting points or hooks I provide either one or two sharpened attaching-shanks, making the whole of two pieces of wire, which are secured firmly together in any suitable manner.

1 denotes the supporting points or hooks, which are formed by sharpening ends of the pieces of wire and curving them downward and then upward.

2 denotes the attaching-shanks, which are sharpened at the ends and are left straight, so as to be readily attached in place, the strain in use being downward or inward, so that no fastening devices are required to hold them in place.

It will be noticed that the shanks are made very much longer than the supporting-points, so as to give firm hold upon the article to which it is attached and prevent it from yielding under strain. In the form shown in Fig. 1 two pieces of wire are used, one end of each piece being an attaching-shank and the other end having formed thereon a supporting-point. The portion of the wire between the

supporting-point and attaching-shank consists of a straight piece, 3, the two straight pieces being laid together in assembling and secured by soldering them together.

In the forms shown in Figs. 3 and 4, instead of soldering the straight pieces 3 together, they are twisted about each other, as shown, so as to lock the two pieces of wire firmly together, giving to the article as a whole two supporting-points and two attaching-shanks.

In the form shown in Fig. 5 the straight piece 3 is provided at each end with a supporting-point, and the attaching-shank is secured thereto by twisting its upper end around the straight portion 3 and securing it by solder. In the form shown in Fig. 6 the entire catchpin is made from a single piece of wire sharpened at both ends. The attaching-shank is made long, as in the other forms, and the supporting-point is formed by bending the upper end of the wire downward and inward, and then outward and upward again, the supporting-point being the same as in the other forms.

It will of course be understood that these details of construction may be greatly varied without departing from the principle of my invention—as, for example, the length of the straight portions and the attaching-shanks—and the shape and curvature of the attaching-points may be changed without affecting the invention in the slightest.

The operation is so simple as hardly to require explanation. The pin is secured in place by sticking the shank or shanks into a chair, sofa, or table-cover, or into the clothing of the user, and the work to be supported simply has to be caught upon the attaching-points, which are preferably made fine and sharp, so as not to injure the work in the slightest.

Having thus described my invention, I claim—

1 A catch-pin consisting of an attaching-shank and a supporting-point formed by curving the wire downward, and then outward and upward, said attaching-shank extending below the curve of the supporting-point.

2. A catch-pin consisting of supporting-points curved downward and upward, and one or more sharpened attaching-shanks, the whole being formed from two pieces of wire attached together in any suitable manner, substantially as shown and described.

In testimony whereof I affix my signature in presence of two witnesses.

EDWARD H. NASH.

Witnesses:

A. M. Wooster,
Etta F. Pettit.

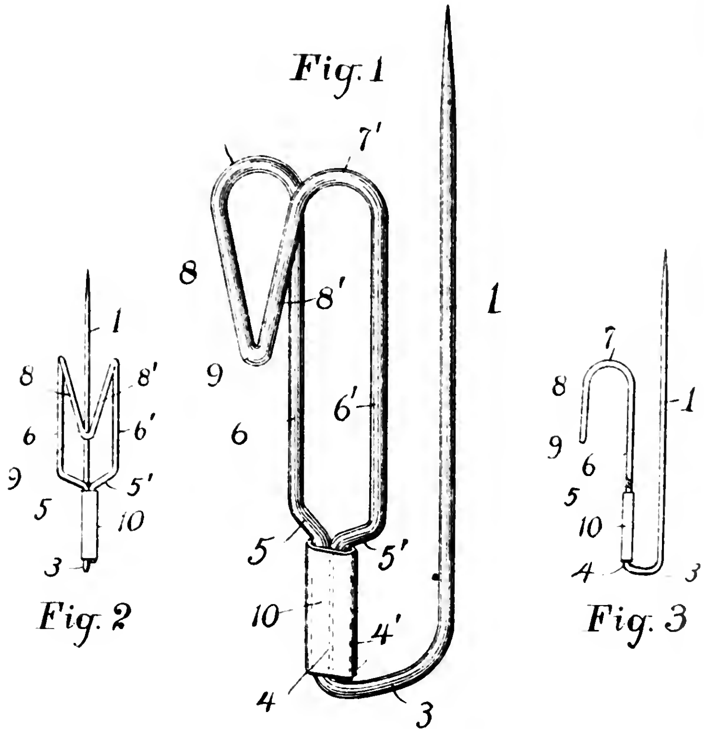
No. 728,769. PATENTED MAY 19, 190[illegible]

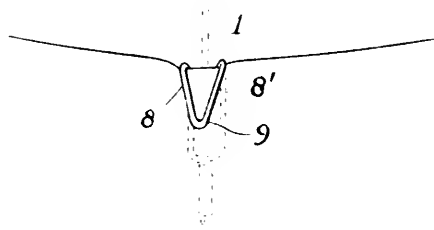
J. A. SAVAGE.

SKIRT HOOK.

APPLICATION FILED OCT. 2, 1901.

NO MODEL.





Witnesses; Fig. 4 Inventor

M. W. Upham.
G. A. Ford

Julia A. Savage;
By A. B. Upham
Her Attorney.

No. 728,769. Patented May 19, 1903.

UNITED STATES PATENT OFFICE.

JULIA A. SAVAGE, OF BOSTON, MASSACHUSETTS.

SKIRT-HOOK.

SPECIFICATION forming part of Letters Patent No. 728,769, dated May 19, 1903.

Application filed October 2, 1901. Serial No. 77,307.
(No model.)

To all whom it may concern:

Be it known that I, JULIA A. SAVAGE, a citizen of the United States, and a resident of Roxbury district, Boston,

county of Suffolk, State of Massachusetts, have invented certain new and useful Improvements in Skirt-Hooks, of which the following is a full, clear, and exact description.

This invention is in the line of hooks for holding down in the present fashionable form the center front of a skirt-band; and the object of my invention is the effecting of certain improvements in detail, as follows: first, to so arrange the waist-engaging hook as to prevent the same from becoming caught in the waist in such a manner as to render it difficult to remove, and second, to strengthen the hook which engages the skirt-band.

Referring to the drawings forming part of this specification, Figure 1 is a perspective view, on an enlarged scale, of my improved skirt-hook. Fig. 2 is a front elevation of the same about normal size. Fig. 3 is a side elevation of the same; and Fig. 4 is a front view of the front part of a skirt-band, showing the hook holding the same.

The reference-numeral 1 designates the pin, which is designed to be inserted upward into the dress-waist or corset, or both, of the user. The lower end of the pin is bent somewhat sharply at its juncture with the shank 3 and the shank somewhat sharply at its juncture with the neck-section 4. Between the stem 6 and said neck-section is a shoulder 5, while at the upper end of said stem is the curved section 7, terminating in the part 8, composing one half of the V-shaped hook 9. The other half, 8′, composing said hook 9, continues on through the bend 7′, the stem 6′, shoulder 5′, and neck 4′, forming a loop terminating in said neck, but otherwise exactly corresponding with the parts designated by the unprimed reference-numerals. Tightly clasped about the said neck-sections 4 4′ is the

collar 10, fitting quite snugly between the shank 3 and the shoulders 5 5′ and serving both to bind the neck 4′ rigidly to the neck 4 and also to perform the function hereinafter set forth.

In all hooks of this character previously constructed the pin, shank, and stem were one smoothly continuous length of wire, and in use the material composing the waist or corset was liable to slip along on the pin and shank and partially up the stem. Hence when the attempt was made to remove the hook from the cloth the latter, being thus around the bend of the hook or pin, simply slid farther up on the stem instead of off the pin, and so made it very hard to remove the hook. In my device, however, the cloth cannot slip farther than the lower end of the collar 10, which constitutes a fixed stop therefor and wholly overcomes the before-mentioned difficulty of removal.

By duplicating the hook and neck sections, as already described, the hook 9 is made of double the strength which it would otherwise be, and as it is only the hook which is liable to be bent at the curves 7 and not the shank 3 the extra strength is put where it is needed and a lighter and neater-looking device produced than can be made by forming the hook and pin sections of a single length of wire strong enough for the hook, but stronger and heavier than is needed for the pin. While light and graceful-appearing, my device is perfectly strong and serviceable. By separating the curves or bends 7 7′ the hook is given a width which more perfectly engages the edge of the skirt-band, being much less liable to fray and cut into the same. The pointed or V shape of the hook 9 enables the

latter to be more readily caught upon the band edge, belt, or buckle.

It will be noticed that the collar 10 is prevented from being forced up along the stem of the hook by means of the shoulders 5 5′, so that the pressure of the cloth along the shank 3 is unable to move said collar from the position best adapted for preventing the cloth from becoming entangled on the shank and stem of the pin. Were the collar 10 omitted and the necks 4 4′ secured together by solder, the extremity of the neck 4′ serves the same function of keeping the cloth from creeping up on the neck 4; but the easy fracture of solder makes the collar preferable.

What I claim as my invention, and for which I desire Letters Patent, is as follows, to wit:

1. The single length of wire formed into the pin at one extremity, and the duplicate necks, shoulders, stems and hook, in combination with the collar embracing said necks and terminally fitting between said shoulders and pin, substantially as described.

2. The single length of wire formed into the pin at one extremity and having the other extremity bent over and secured near the base or shank of the pin; the doubled portion of the wire being formed into the V-shaped hook with its bends located substantially apart, substantially as described.

3. In a skirt-hook, the combination of the wire loop having one part thereof bent over to form the two-strand skirt-engaging hook; the pin projecting from the part thereof opposite to said hook and in a reverse direction thereto; and a collar binding the parts together and acting to prevent the fabric into which said pin is inserted from slipping past the shank thereof, substantially as described.

In testimony that I claim the foregoing invention I have hereunto set my hand this 30th day of September, 1901.

JULIA A. SAVAGE.

Witnesses:

A. B. Upham,

G. F. Haskins.

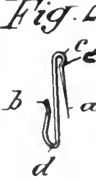
No. 751,305. PATENTED FEB. 2, 1904.

A. E. G. M. LACOIN.

NECKTIE BAND FASTENER.

APPLICATION FILED NOV. 5, 1902.

NO MODEL.



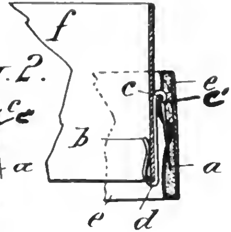


Fig. 4.

b c f a d e e e

Witnesses: Inventor:

Auguste Emile Gustave Marie Lacoin

per B. Singer. Attorney

THE NORRIS PETERS CO., PHOTO-LITHO., WASHINGTON, D. C.

No. 751,305. Patented February 2, 1904.

UNITED STATES PATENT OFFICE.

AUGUSTE EMILE GUSTAVE MARIE LACOIN, OF PARIS, FRANCE.

NECKTIE-BAND FASTENER.

SPECIFICATION forming part of Letters Patent No. 751,305, dated February 2, 1904.

Application filed November 5, 1902. Serial No. 130,176.
(No model.)

To all whom it may concern:

Be it known that I, AUGUSTE EMILE GUSTAVE MARIE LACOIN, a citizen of the French Republic, and a resident of Paris, France, have invented certain new and useful Improvements in Necktie-Band Fasteners, of which the following is a specification.

The object of this invention is a fastener intended to fix ties to collars in such a manner that the said ties can neither rise up nor slip upon the collars.

The different systems of fixing ties in vogue up to the present are without exception of a complicated manufacture, which is a great inconvenience. They require the use of springs, which very quickly lose their elasticity by reason of the oxidation produced by perspiration. Moreover, the greater portion of these clips fasten the lower end of the tie to the shirt-front, and owing to this, although the tie may be well fixed, it slips upon the collar whenever the shirt-front slips up, creases, or loses its stiffness. The fastener forming the objection of this invention remedies these defects. It is formed of a metal pin flattened out at one end and pointed at the other, then folded in the form of an S, so as to constitute two hooks, one of which engages the lining of the tie, while the other, bent in the opposite direction, hooks under the collar, thus retaining the tie in place.

In the accompanying drawings, given by way of example, Figure 1 shows the form of the metal pin intended to form a fastener. Fig. 2 shows a finished fastener. Fig. 3 shows the fastener engaged in the lining of a tie and on a collar. Fig. 4 shows the fastener in position and holding the tie to the collar.

The tie-fastener shown in Figs. 1 to 4 comprises a metal pin *a b*, one end whereof is flattened and presents a surface of a certain width tapering down toward the other end *a*, where it terminates in a pointed end, thereby constituting a pin. This pin is bent into the form of an S in order to constitute two hooks *a c* and *b d*, one of which *a c*, is intended to enter the lining *e* of the tie and the

other end, *b d*, hooks beneath the collar *f* in such a way as to maintain the tie by acting as a spring and to prevent it from rising up. The body portion of the fastener, together with the portions *c* and *a*, form an outwardly curved portion at the upper end of the fastener, which is also bent inwardly toward the body portion and extended away at an angle to the body portion. From this inner end extends the hook portion *a*, which engages the tie. At the point where the inwardly-bent portion *c* joins the hook *a* is formed an impinging point of contact *c* ′, adapted to more securely hold the tie by contact therewith. The flattened end *d* of the body portion is bent inwardly toward the body, this curved portion being adapted to receive the collar, and is then bent outwardly from the body to form a contacting portion *b*. The formation of this portion of the fastener produces an impinging spring member *b d*, which serves to hold the device securely upon the collar.

The above-described tie-fasteners can be fixed with the greatest ease at any part of the tie and as many as required; but it is only necessary to have a fastener at the back of the collar and one at each side of the tie-knot to completely maintain the same in place.

The tie-fastener described once applied is invisible, which is not the case with the fasteners hitherto employed. This fastener can also be made in all sizes and of any suitable material. By the peculiar shape of the spring forming ends of this fastener the spring portions are protected from the detrimental effect of perspiration when secured to the collar.

Having now fully described my invention, what I claim, and desire to secure by Letters Patent, is—

A tie-fastener comprising an integral metal pin formed with an enlarged flattened end and tapering to a point at its other end, the body portion of said pin being straight and the ends thereof being bent on opposite sides to form hooks, the pointed end being bent toward the body portion and then extended away from said portion at an angle thereto, thereby forming a contacting point adapted to hold the tie more firmly within the fastener, and the flattened end of said body portion being first bent toward the body portion and then away therefrom, thereby forming a spring member with a contacting portion adapted to engage the collar and secure the fastener to the collar, substantially as described.

In testimony whereof I have hereunto set my hand in presence of two witnesses.

AUGUSTE EMILE GUSTAVE MARIE LACOIN.

Witnesses:

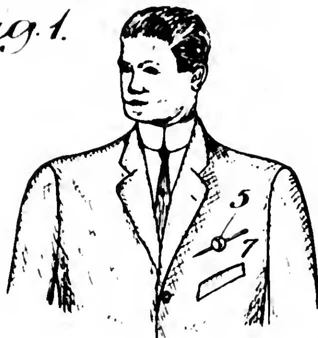
ADOLPHE STURM,

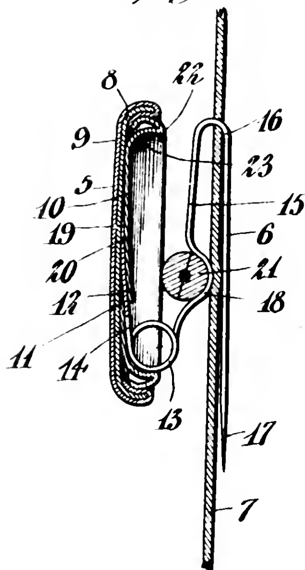
EDWARD P. MACLEAN.

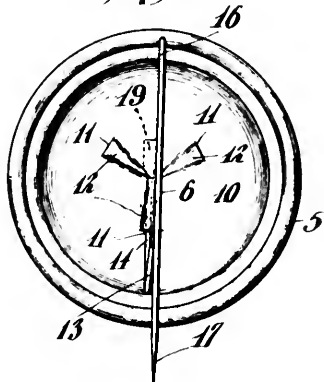
(Photo.)

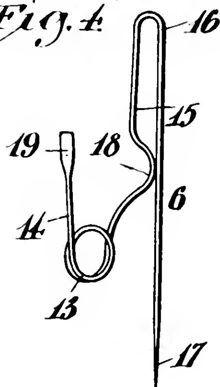
J. C. BLIEMEISTER.
BADGE AND PENCIL HOLDER.
APPLICATION FILED JULY 22, 1914.

1,170,601. Patented Feb. 8, 1916.









Witnesses:
Jacob Oberst Jr.
Eda M. Schweiger.

John C. Bliemeister, Inventor.
By Emil Neuhart
Attorney.

UNITED STATES PATENT OFFICE.

JOHN C. BLIEMEISTER, OF BUFFALO, NEW YORK.

BADGE AND PENCIL HOLDER.

1,170,601. Patented Feb. 8, 1916.

Specification of Letters Patent.

Application filed July 22, 1914. Serial No. 852,381.

To all whom it may concern:

Be it known that I, JOHN C. BLIEMEISTER, a citizen of the United States, residing at Buffalo, in the county of Erie and State of New York, have invented certain new and useful Improvements in Badge and Pencil Holders, of which the following is a specification.

My invention relates to a combined badge and pencil holder adapted to be attached to some part of the wearing apparel and to display the matter printed, stamped, or otherwise placed upon the badge, while conveniently retaining the pencil in position.

The primary object of my invention is the production of a pencil holder having a badge portion on which may be printed or otherwise displayed an advertisement, or in certain cases to disclose the authority of the person using the same to make collections, inspections and the like.

Another object of my invention is the provision of a device of this kind which is inexpensive and which will retain a pencil in position and at the same time assure the secure fastening of the device to the wearing apparel; the device on account of its inexpensive construction serving admirably as an advertising novelty which can be gratu-

itously distributed, or given away with purchases of different commodities.

The invention consists in the novel features of construction and in the arrangement and combination of parts to be hereinafter described and more particularly pointed out in the subjoined claims.

Figure 1 is a view showing my improved badge and pencil holder applied to a garment. Fig. 2 is an enlarged vertical section through the device and a portion of a garment, showing the manner in which the pencil is retained within the device and serves to assist in clamping the garment to prevent accidental detachment of the device therefrom. Fig. 3 is a rear view of the device. Fig. 4 is a detached perspective view of the combined pencil retainer and fastening member.

Referring now to the drawings in detail, like numerals of reference refer to like parts in the several figures.

The device comprises two parts, one a badge or display member 5, and the other a combined pencil retainer and fastening member 6.

7 designates a garment to which the device is adapted to be secured.

The badge or display member 5 may be constructed in any suitable manner permitting of the particular attachment thereto of the combined pencil retainer and fastening member herein shown. The preferred construction comprises a disk having a metallic foundation or body portion 8 over the outer face of which a circularly formed piece of celluloid 9 is adapted to be placed, the celluloid serving as the facing member and having the desired information or advertisement printed, stamped or otherwise displayed thereon. The marginal portion of the celluloid

is curved around the foundation or body portion 8 and is clamped thereto by a back plate 10, said back plate being formed of resilient material so that it will effectively retain the celluloid facing member in place. Said back plate is provided with a plurality of slits 11 which are arranged at right angles to radial lines, and the metal of the backing extending inwardly from said slits is raised, as at 12, to permit one end of the combined pencil retainer and fastening member to be thrust behind the back plate. Although a single slit would be sufficient to provide a practicable device of this kind, I preferably provide a plurality of slits for the reason that when the back plate is placed in position to clamp the marginal portion of the celluloid facing member it will not be necessary to place said back plate in any particular position with reference to the matter displayed on the badge or button.

The combined pencil retainer and fastening member is inserted in the slit 11 which will serve to bring the display matter on the badge or button in proper position. The combined pencil retainer and fastening member is formed of wire coiled at a point near one end, as at 13, the wire being extended from the coil in two stretches, 14, 15, the stretch 15 being rebent upon itself, as at 16, and its extremity pointed, as at 17, so that it serves as a pin. The stretch of wire 15 between the coil and its rebent portion is curved or crooked, as at 18, and this curved or crooked portion lies in contact with the rebent portion 16. The extremity of the stretch of wire 14 is flattened, as at 19, and this flattened portion is adapted to be thrust through any one of the slits 11 in the back plate and be forced inwardly between said back plate and the foundation or body portion 8 of the badge member, as at 20. The flat-

tened portion 19 being securely clamped between said back plate and foundation or body portion prevents turning of the combined pencil retainer and fastening member on the badge member.

When attaching the device to a garment, the rebent or pin portion 16 thereof is thrust through the material of the garment and the crooked or curved portion 18 serves to clamp the material of the garment so that the device cannot accidentally become disengaged therefrom. This clamping tendency of the crooked or curved portion 18 is increased when a pencil is thrust into the device, as shown at 21, the pencil being forced downwardly between the badge member and the stretch of wire 15, the badge member being flexed outwardly on the coil 13 during this action and recovering itself when the pencil reaches the crooked or curved portion 18 in which it is retained, the edge portion 22 of the back plate being in contact with the pencil and being pressed thereagainst by the action of the coil 13. The pencil when positioned within the holder lies at right angles to the combined pencil retainer and fastening member and the proper position of the device is such that said combined pencil retainer and fastening member is always in vertical or substantially vertical position. There is consequently no tendency of the pencil moving lengthwise within the device, as would be the case if said combined pencil retainer and fastening member were arranged in horizontal position.

The device as described is one that can be easily assembled, and attention is invited to the fact that the back plate is curved rearwardly, as at 23, as the metal of the same leaves the foundation or body portion 8. This permits of placing the coil 13, when the parts are assembled,

in contact with the outwardly curved portion of the back plate and said curved portion serves as a stop to prevent accidental disengagement of the badge or display member from the combined pencil retainer and fastening member, it being necessary that the badge or display member be forced outwardly away from the coil, or the coil forced inwardly from the back plate thereof, before the two parts of the device can be separated. Yet the construction is such that the securing end 14 of the wire can be easily thrust through any of the slits 11 and into the space between the foundation or body portion 8 and the back plate 10.

Having thus described my invention, what I claim is,—

1. A combined badge and pencil holder comprising a badge or display member, and a combined pencil retainer and fastening member formed of wire fashioned into a coil and having the wire extended in two stretches from said coil, one of said stretches being secured to said badge or display member and the other being directed substantially parallel with said first stretch and recurved upon itself, the extremity of said recurved portion being pointed to permit of attaching the device to a garment, said second-mentioned stretch being spaced from said badge or display member to permit of placing a pencil between the two.

2. A combined badge and pencil holder comprising a badge or display member and a combined pencil retainer and fastening member, said pencil retainer and fastening member being formed of wire fashioned into a coil near one end and having a short and a comparatively long stretch of wire extending from said coil, said short stretch of wire being fastened to said badge or display member

and said long stretch being recurved upon itself and having its extremity pointed, said long stretch being further provided with a crooked or curved portion between its recurved portion and said coil and said crooked or curved portion lying in contact with said recurved portion.

3. A device of the kind described, comprising a badge or display member having a foundation or body portion and a back plate, said back plate being provided with a slit, and a fastening member formed of wire having one extremity flattened and adapted to be thrust through said slit and be entered and clamped between said foundation or body portion and said back plate.

4. A device of the kind described, comprising a badge or display member having a back plate provided with a plurality of slits arranged in different radial planes, and a fastening member formed of wire adapted to have one end thereof thrust behind said back plate through any one of said slits.

5. A device of the kind described, comprising a badge or display member having a back plate provided with slits arranged in different radial planes, and a fastening member formed of wire fashioned into a coil near one end to provide a long and a short stretch of wire extending therefrom, said short stretch of wire being flattened at its extremity and thrust behind said back plate through any one of said slits.

In testimony whereof I affix my signature in presence of two witnesses.

JOHN C. BLIEMEISTER.

Witnesses:

EMIL NEUHART,

EDA M. SCHWEIGER.

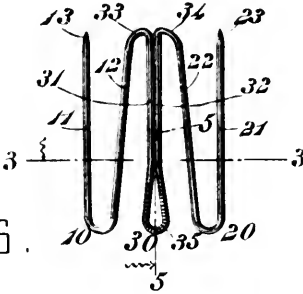
Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

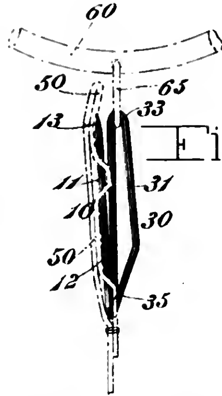
E. B. ASHMORE.

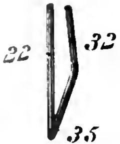
DRAPERY SUSPENSION PIN FOR CURTAIN RINGS.

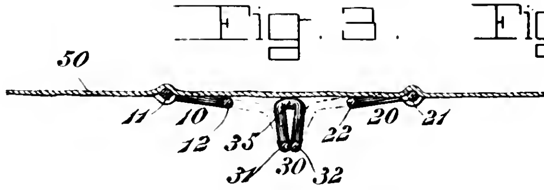
APPLICATION FILED JAN. 9, 1912.

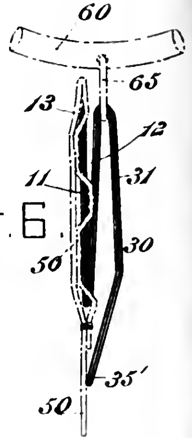
1,069,999. Patented Aug. 12, 1913.

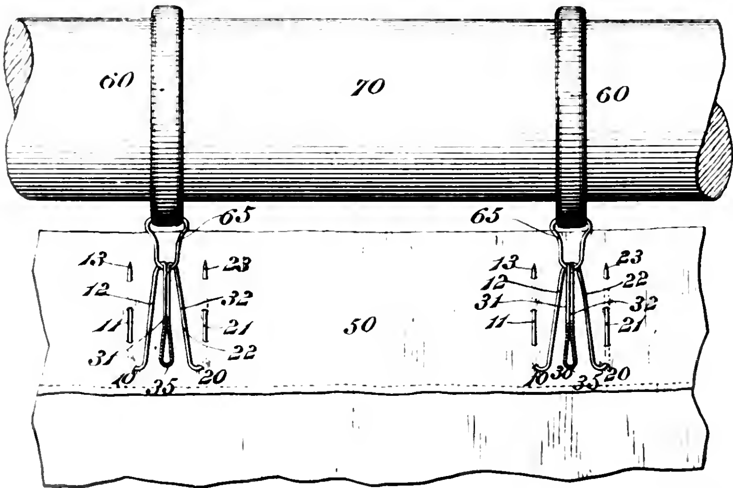












Witnesses

Harry King

Mary Y. Brooks

Inventor

Edith B. Ashmore

By R. C. Jones,

Attorney

Ashmore 1,069,999 Aug. 12, 1913.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA. SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks, Plaintiffs, vs. LE SAGE & COMPANY, INC., a corporation, Defendant.	H. L. N. P. No. M 27 M Equity.

DEFENDANT'S EXHIBIT O.

(Attached to New York Depositions)

(Photo.)

UNITED STATES PATENT OFFICE.

EDITH BANCROFT ASHMORE, OF PHILADELPHIA, PENNSYLVANIA.

DRAPERY-SUSPENSION PIN FOR CURTAIN-RINGS.

1,069,999. Patented Aug. 12, 1913.

Specification of Letters Patent.

Application filed January 9, 1912. Serial No. 670,230.

To all whom it may concern:

Be it known that I, EDITH BANCROFT ASHMORE, a citizen of the United States of America, residing at

Philadelphia, in the county of Philadelphia, in the State of Pennsylvania, have invented certain new and useful Improvements in Drapery-Suspension Pins for Curtain-Rings, whereof the following is a specification.

This invention relates to hookpins especially adapted for hanging curtains, portieres and other draperies in connection with the rings of curtain poles.

The object of the invention is to provide a pin of this character which, combining the properties of simplicity of construction, cheapness of manufacture and facility of application, will lie approximately flat with the plane of the fabric, holding it straight and preventing it from flopping or falling over will not tear the fabric and will have a substantial frictional locking contact therewith.

Figure 1 of the accompanying drawings represents a front elevation of a drapery suspension pin embodying this invention. Fig. 2 represents a side elevation thereof. Fig. 3 represents a horizontal section thereof on line 3—3 of Fig. 1. Fig. 4 represents a fragment of a curtain and two of these suspension pins applied thereto in operative connection with curtain pole rings, and a fragment of a curtain pole. Fig. 5 represents a vertical section on line 5—5 of Fig. 1. Fig. 6 represents a side elevation of the device in which the tongue is elongated and comes in contact with the fabric at a point below the return bends of the upturned hooks.

The same reference numbers indicate corresponding parts in the different figures.

This drapery suspension hookpin is composed of wire in one piece and comprises two outer upturned U-shaped hooks 10 and 20 laterally spread in approximately the same plane, their inner legs 12 and 22 diverging downward

the outer upturned legs 11 and 21 having sharpened prongs 13 and 23, and an intermediate downturned tongue 30 composed of two wires 31 and 32 united respectively by return bends 33 and 34 with the upper end of said diverging inner legs 12 and 22 of said upturned hooks and at their lower ends with each other by a return bend 35. The tongue is preferably spread slightly at its lower end and bent inward approximately to the plane of said spread upturned hooks.

In Fig. 6 the tongue 35′ corresponding to the tongue 35 of the other figures, is elongated so as to touch the fabric at a point below the plane of the bends 10 and 20. This construction may be preferred in some cases.

In the use of this drapery pin, the pointed prongs 11 and 21 are inserted in the fabric of the curtain 50 as indicated in Figs. 2, 3 and 4 and the tongue 30 is passed through the eye 65 hung in the curtain pole ring 60 on the curtain pole 70 as shown in Fig. 4. The spreading of the whole structure into approximately the same plane causes the hooks to hold the fabric without wrinkling, the diverging inner legs 12 and 22 and the backward bend of the tongue 30 between them all resting against the fabric. The bent tongue also serves as a friction lock against accidental detachment of the hook 35 from the eye 65 as sometimes happens with ordinary hooks when the curtain is suddenly thrown or jerked for the purpose of sliding it along the pole. The inverted spread hooks with sharpened points perform the double function of engaging the fabric without stitching and of holding the edge thereof straight after engagement, thus keeping the fabric from flopping or falling over.

I claim as my invention:

A curtain pole ring drapery suspension pin composed of wire in one piece and comprising two upturned hooks laterally spread in approximately the same plane, their inner legs diverging downward and their outer legs constituting sharp pointed pins, and an intermediate downturned tongue united with the upper ends of said diverging inner legs and extending downward between them forming therewith a downturned hook, the lower end of said tongue being bent backward approximately to the plane of said spread hooks and adapted to form a frictional lock in connection with the fabric to be suspended.

EDITH BANCROFT ASHMORE.

Witnesses:

FRANK CHASE SOMES,

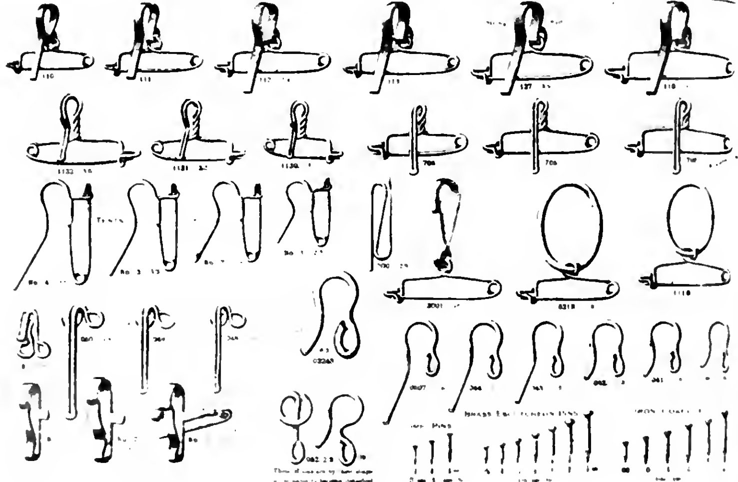
MARY Y. BROOKS.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

(Photo.)

ENTERED AT STATIONERS HALL COPYRIGHT

62



Great Britain and Ireland.
London, England,
Consulate-General of the United States of America. } SS:

I, J. P. Doughten ~~Vice~~-Consul of the United States of America, at London, England, do hereby make known and certify to all whom it may concern, that the signature "M. C. B. Dawes" subscribed to the annexed Certificate, is of the true and proper handwriting of M. C. B. Dawes, Assistant Keeper of the Public Records, London, England that the seal affixed to the said Certificate is the seal of the Public Record Office England and that to all acts signed as the annexed full faith and credit are and ought to be given in Judicature and thereout.

In testimony whereof I have hereunto set my hand and affixed the Seal of the Consulate-General of the United States of America, at London,

(Seal) England, aforesaid, this 5th day of December 1927.

J. P. Doughten
~~Vice~~-Consul of the United States of America,
at London, England.

[American Consulate Office $2 Fee Stamp]

Service No. 14807 Fee $2=8s. 4d.

PUBLIC RECORD OFFICE COPY.

(Pursuant to Statute 1 & 2 Vict., c. 94.)

[Emblem; 4 Documentary Stamps]

Copyright Records. Registry Books. Vol. 35. Part 2.
Original. Entries. 1894 to 1896. Page 25.

25 No.	Time of making the Entry	Title of Book	Name of Publisher and Place of Publication.	Name and Place of Abode of the Proprietor of the Copyright.	25 Date of First Publication.
9248	Jan 19 1895	Centenary Edition of General Brass-foundry 1895.	Tonks, Limited. 201, Moseley St., Birmingham.	Tonks, Limited, 201, Moseley St., Birmingham.	1st January 1895.

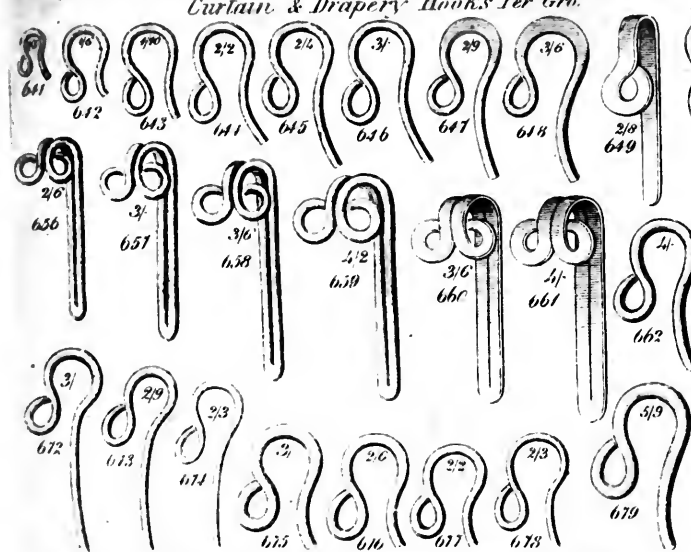
I certify that the foregoing is a true and authentic Copy.

M. C. B. Dawes,
Assistant Keeper of the Public Records..
2nd December 1927

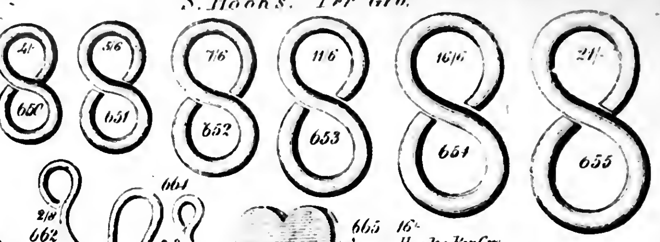
[Seal]

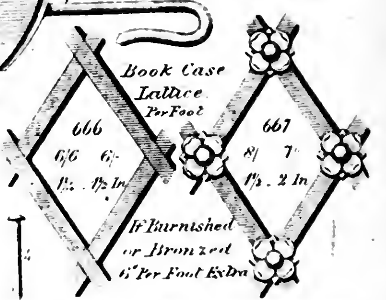
Whitehouse - Mfrs Ex B

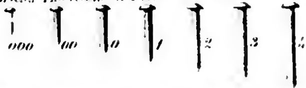
Curtain & Drapery Hooks Per Gro.



S. Hooks. Per Gro.







Brass Escutcheon Pins Per lb.

000 00 0 1 2 3

Defts Ex AA

(Photo.)

Patented Nov. 27th 1923

[Cut of Non-Sew-On Drapery Hook]

Pat

"A Labor Saver"

NON-SEW-ON DRAPERY HOOK C. P. D.

Manufactured by

McGHEE & JINKS

4337 Price Street Los Angeles, Calif.

Phones RO-0397 596-056

March 14, 1927.

H. L. Judd Co.,
87 Chambers St.,
New York City, N. Y.

Gentlemen:

This is to notify you that the brass drapery hooks which you are manufacturing and selling are an infringement of our United States Letters Patent No. 1,475,306, issued November 27, 1923, to James W. McGhee and Edward C. Jinks.

In the past, your Company has shown a disposition not to infringe our patents, and we are taking this means of calling the infringement to your attention. We dislike to commence any litigation, but if we are compelled to to protect our patent rights, we will do so.

We therefore at this time make demand on you that you cease manufacturing and selling these drapery hooks, and we demand at this time that you account to us for the profits made by you in the manufacture and sale of these drapery hooks.

We find these drapery hooks so manufactured and sold by you in the hands of several of the large department stores and jobbers throughout the United States, and unless you immediately cease manufacturing and selling these drapery hooks and account to us for the profits you have made and the damages that we have sustained by reason of your manufacture and sale of these hooks, we will be obliged to protect our patent by bringing infringement suits in the proper Courts.

Yours very truly,

McGHEE & JINKS,

By James W. McGhee.

JWMcG/MFB

[Endorsed]: No. M-27-M Eq. McGhee & Jinks vs. Le Sage & Co Defts Exhibit No. CC Filed 5/3 1928 R. S. Zimmerman, Clerk by Murray E. Wire, Deputy Clerk

UNITED STATES DISTRICT COURT, SOUTHERN
DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGhee & Jinks, Plaintiffs,	H. L.
	N. P.
vs.	No. M 27 M
LeSAGE & COMPANY, INC., a corporation, Defendant.	Equity

Defendant's Exhibit 101 for identification. (Attached to New York Depositions.)

H. L. Judd Company Letterhead [copy mutilated]

REPLY TO

Wallingford, Conn. March 31, 1926.

Messrs. McGhee & Jinks,
Los Angeles, Cal.

Gentlemen:—

We have seen samples of your patented "Non Sew On" Drapery Hooks, and would be obliged if you would give us the name of the patentee and the date or number of this patent.

You are probably aware that the marking of an article "Patented" without the date, does not give sufficient notice to any one who makes a similar article, while the marking of an article "Patented" with intent to deceive, renders a liability from the offender. Please not accept this in any offensive sense. We are large manufacturers and have some Hooks very similar to that you use and desire in no way to interfere with your patented rights. The informa-

tion sought is with a desire to avoid any infringement; in other words, we desire to extend to you the same courtesy we would expect from others.

Awaiting a favorable reply, we are

Yours truly,

H. L. JUDD CO., Inc.,

Wm. H. Edsall

WHE/K Vice Pres.

[Endorsed]: No. M-27-M. McGhee & Jinks vs. Le Sage & Co defts Exhibit No. DD Filed 5/3 1928 R. S. Zimmerman, Clerk by Murray E. Wire, Deputy Clerk

[Face of Envelope]

If not called for in 5 Days, return to
H. L. JUDD COMPANY, Inc.
Drapery Hardware, Carpet Hardware,
Brass Fancy Goods, etc.
42 So. Cherry St.,

WALLINGFORD, CONN.

Messrs. McGhee & Jinks,
Los Angeles,
California.

[Five Postage Stamps—1 10c, 1 5c, 2 2c, 1 1c]

Registered Return Card Requested.

Registered No. 2958

[Stamped in Fist]: Returned to Writer unclaimed from Los Angeles, Calif.

[Stamped on face]: Unclaimed. Apr 5—1926 2nd NOTICE Apr 9 1926 Apr 14 1926 7813

[Written in pencil]: Sent 4/19/26 to 4337 Price St Los Angeles Calif

[Written in ink]: defts DD. M-27-M-Eq (M)

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS,

Plaintiffs,

vs.

LeSAGE & COMPANY, INC., a corporation,

Defendant.

IN EQUITY NO. M-27-M

PETITION FOR APPEAL

TO THE HONORABLE Wm. P. JAMES, UNITED STATES DISTRICT JUDGE:

The above named plaintiffs, feeling aggrieved by the Decree rendered and entered in the above entitled cause on the 6th day of July, 1928, do hereby appeal from said Decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons set forth in the Assignment of Errors filed herewith, and pray that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceeding, papers and documents upon which said Decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such courts in such cases made and provided; and your peti-

tioners further pray that the proper Order, relating to the security to be required by them, be made.

James W. McGhee,
Edward C. Jinks.
By Henry S. Richmind
Solicitors for Plaintiffs.

Lyon & Lyon
Henry S. Richmond
Attorneys and counsel for Plaintiffs.

[Endorsed]: In Equity No. M-27-M United States District Court Southern District of California Southern Division James W. McGhee and Edward C. Jinks, etc. Plaintiff vs. LeSage & Company, Inc., a corporation, Defendant Petition for Appeal Filed Oct. 5, 1928 R. S. Zimmerman R. S. Zimmerman, Clerk. Lyon & Lyon Frederick S. Lyon Leonard S. Lyon 708 National City Bank Building Los Angeles, Cal.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION.

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS, Plaintiffs, vs. LeSAGE & COMPANY, INC., a corporation, Defendant.	IN EQUITY NO. M-27-M

ASSIGNMENT OF ERRORS.

Now come the above named plaintiffs, JAMES W. McGHEE and EDWARD C. JINKS, and file the follow-

ing Assignment of Errors upon which they will rely upon the prosecution of the appeal, in the above entitled cause, from the Decree entered and recorded July 6th, 1928, by this Honorable Court, ORDERING, ADJUDGING and DECREEING that plaintiffs' Bill of Complaint be dismissed:

That the United States District Court for the Southern Division of the Southern District of California erred

I. In decreeing that the Bill of Complaint be dismissed.

II. In decreeing that defendant have judgement against plaintiffs, and each of them, for defendant's costs and disbursements incurred in the above entitled cause.

III. In failing to find and decree that United States Letters Patent No. 1,475,306, granted to plaintiffs November 27, 1923, for DRAPERY HOOK, are good and valid in law.

IV. In finding that United States Letters Patent No. 1,475,306 were invalid in that the patent discloses no invention over devices made and marketed prior to the date of the patent application and that plaintiffs' device was not new in the art.

V. In failing to find and decree that defendant infringed United States Letters Patent No. 1;475,306.

VI. In admitting in evidence defendant's exhibits A and B, being, respectively, Tonks Catalogue and The Whitehouse Catalogue.

VII. In failing to find and decree that plaintiffs were entitled to the relief prayed for in their Bill of Complaint.

WHEREFORE, the appellants pray that said decree be reversed and that said District Court of the Southern Division for the Southern District of California, be ordered to enter a decree reversing the decision appealed

from and entering a decree in favor of plaintiffs in this cause, as prayed in the Bill of Complaint.

JAMES W. McGHEE
EDWARD C. JINKS
By Henry S. Richmond
Solicitor for said Plaintiffs.

Lyon & Lyon
Henry S. Richmond
Solicitors and of counsel for Plaintiffs.

[Endorsed]: In Equity No. M-27-M. United States District Court Southern District of California, Southern Division. James W. McGhee and Edward C. Jinks, etc., plaintiff, vs. Le Sage & Company, Inc., a corporation, defendant. Assignment of Errors. Filed Oct 5, 1928 R. S. Zimmerman, R. S. Zimmerman, Clerk. Lyon & Lyon Frederick S. Lyon, Leonard S. Lyon 708 National City Bank Building Los Angeles, Cal.

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS,

Plaintiffs,

vs.

LeSAGE & COMPANY, INC., a corporation,

Defendant.

IN EQUITY NO. M-27-M

ORDER ALLOWING APPEAL

On motion of HENRY S. RICHMOND, ESQ., one of the solicitors and of counsel for the above named plaintiffs,

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein on the 6th day of July, 1928, *may*, and the same is hereby, allowed and that a certified transcript of the record, testimony, exhibits, stipulation and all proceedings be forthwith transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that bond on appeal be fixed in the sum of Two Hundred Fifty ($250.00) Dollars to act as a bond for costs on appeal.

DATED this 5 day of October, 1928.

Wm P. James
United States District Judge.

[Endorsed]: In Equity No. M-27-M United States District Court Southern District of California Southern Division. James W. McGhee and Edward C. Jinks, etc. Plaintiff vs Le Sage & Company, Inc., a corporation, Defendant Order Allowing Appeal. Filed Oct. 5 1928 R. S. Zimmerman, Clerk, By L. J. Cordes, deputy clerk. Lyon & Lyon Frederick S. Lyon Leonard S. Lyon 708 National City Bank Building Los Angeles, Cal.

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS,

Plaintiffs,

vs.

LeSAGE & COMPANY, INC., a corporation,

Defendant.

In Equity
No. M-27-M

KNOW ALL MEN BY THESE PRESENTS that we, JAMES W. McGHEE and EDWARD C .JINKS, as principals, and Two Hundred and Fifty ($250,00) Dollars cash as surety, are held and firmly bound unto LeSAGE & COMPANY, INC. in the full and just sum of Two Hundred and Fifty ($250.00) Dollars to be paid to said LeSAGE & COMPANY, INC., its attorneys, executors, administrators or assigns: to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators jointly and severally by these presents. Sealed with our seals and dated this 8th day of October, 1928.

WHEREAS lately at a District Court of the United States for the Southern District of California in a suit pending in said court between JAMES W. McGHEE and EDWARD C. JINKS, plaintiffs, and LeSAGE & COMPANY, INC., defendant, a decree was rendered against the said JAMES W. McGHEE and EDWARD C. JINKS, and the said JAMES W. McGHEE and ED-

WARD C. JINKS having obtained an appeal and filed a copy thereof in the Clerk's office of said court to reverse the decree in the aforesaid suit, and a citation directed to the said LeSAGE & COMPANY, INC. citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco in said court on the 4th day of November next;

NOW, the condition of the above obligation is such, that if the said JAMES W. McGHEE and EDWARD C. JINKS shall prosecute their appeal to affect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

SEALED and delivered in the presence of:
Henry S. Richmond
I. L. Fuller

James W. McGhee
Edward C. Jinks
Approved by:
Wm P James
U. S. District Judge

[Endorsed]: No. M-27-M. United States District Court Southern District of California, Southern Division. James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks, plaintiffs, vs. Le Sage & Company, Inc. a corporation, defendant. Bond on Appeal. Filed Oct 8, 1928 R. S. Zimmerman. R. S. Zimmerman, Clerk. Lyon & Lyon, Frederick S. Lyon, Leonard S. Lyon, 708 National City Bank Building, Los Angeles, Cal.

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS,

Plaintiffs-Appellants,

vs.

LeSAGE & COMPANY, INC., a corporation,

Defendant-Appellee.

In Equity
No. M-27-M

PRAECIPE FOR TRANSCRIPT OF RECORD ON APPEAL UNDER EQUITY RULE 75

TO THE CLERK OF SAID COURT:

Sir: After approval of statement of evidence:

Please compare proof to be furnished you by printer, and certify under the provisions of the Act of February 13, 1911, c. 47, Sec. 1, 36 Stat. 901; Title 28, c. 18, Sec. 865 of the United States Code printed transcript of Record on appeal in the above entitled cause for filing by appellants James W. McGhee and Edward C. Jinks with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, which said transcript shall contain true and complete copies of the following files, records, and documents:

(1) Bill of Complaint filed June 11, 1927;

(2) Answer of Defendant, filed August 2, 1927;

(3) Minute Order of Judge James filed June 23, 1928;

(4) Final Decree entered July 6, 1928;

(5) Plaintiffs' Exhibit 1, Letters Patent No. 1,475,306;

(6) Plaintiffs' Exhibit 2, Assignment of Letters Patent No. 1,475,306 from McGhee to Jinks;

(7) Plaintiffs' Exhibit 3-B, invoice of LeSage & Company dated June 9, 1927;

(8) Plaintiffs' Exhibit 4, letter LeSage & Company to Lyon & Lyon dated March 14, 1927;

(9) Defendant's Exhibit CC, letter from McGhee and Jinks to H. L. Judd Company dated March 14, 1927;

(10) Defendant's Exhibit DD, letter from Judd & Co. to McGhee & Jinks dated March 31, 1926;

(11) Defendant's Exhibit J, certified copy of file wrapper and contents of patent in suit No. 1,475,306;

(12) Defendant's Exhibit K, British patent to French 28,885 of Dec. 16, 1912;

(13) Defendant's Exhibit L, British patent to Harrison of April 28, 1886;

(14) Defendant's Exhibit M, British patent to Timmis of June 23, 1910;

(15) Defendant's Exhibit N consisting of the following patents:

Fay	No.	15,226	dated	July 1, 1856
Gunn		303,370	"	Aug. 12, 1884
Riggs		392,363	"	Nov. 6, 1888
Nash		404,102	"	May 28, 1889
Savage		728,769	"	May 19, 1903
Lacoin		751,305	"	Feb. 2, 1904
Bliemeister		1,170,601	"	Feb. 8, 1916

(16) Defendant's Exhibit O, patent to Ashmore No. 1,069,999 dated August 12, 1913;

(17) Defendant's Exhibit AA, certified copy of public record of Great Britain vised by the U. S. Consul at London;

(18) Petition for appeal filed Oct. 5, 1928;

(19) Assignments of error filed Oct. 5, 1928;

(20) Order allowing appeal entered Oct. 5, 1928;

(21) Bond on Appeal filed Oct. 8, 1928;

(22) Citation issued Oct. 5, 1928, with return of service, Oct. 8, 1928;

(23) Praecipe under Rule 75 for record filed Dec. 11, 1928;

(24) Statement of evidence filed Dec. 11, 1928;

(25) Notice of Lodgment of Statement of Evidence in Clerk's Office and notice of hearing filed Dec. 11, 1928.

Dated this 11th day of December, 1928.

Respectfully,

Lyon & Lyon,
Henry S. Richmond
Solicitors and of Counsel for Appellants

[Endorsed]: No. M-27-M United States District Court Southern District of California Southern Division James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks, Plaintiffs-Appellants vs Le Sage & Company, Inc., a corporation, Defendant-Appellee Praecipe for transcript of record on appeal under Equity Rule 75 Due service and receipt of a copy of the within Praecipe is hereby admitted this 11th day of December, 1928 Raymond Ives Blakeslee Atty for Appellee Filed Dec. 11, 1928. R. S. Zimmerman Clerk, by M. L. Gaines Deputy Clerk Lyon & Lyon Frederick S. Lyon Leonard S. Lyon Lewis E. Lyon 708 National City Bank Building Los Angeles, Cal.

IN THE UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF CALIFORNIA,
SOUTHERN DIVISION

JAMES W. McGHEE and EDWARD C. JINKS, trading as McGHEE & JINKS, Plaintiffs, vs. LeSAGE & COMPANY, INC., a corporation, Defendant.	IN EQUITY NO. M-27-M

CLERK'S CERTIFICATE.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 148 pages, numbered from 1 to 148 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation; bill of complaint filed June 11, 1927; answer of defendant, filed August 2, 1927; minute order of Judge James filed June 23, 1928; final decree entered July 6, 1928; statement of evidence; notice of lodgment of statement of evidence and notice of hearing; plaintiffs' Exhibit 1, Letters Patent No. 1,475,306; Plaintiffs' Exhibit 2, Assignment of Letters Patent No. 1,475,306 from McGhee to Jinks; Plaintiffs' Exhibit 3-B, invoice of LeSage & Company dated June 9, 1927; Plaintiffs' Exhibit 4, letter LeSage & Company to Lyon & Lyon dated March 14, 1927; Defendant's Exhibit H; Defendant's Exhibit CC, letter from McGhee and Jinks to H. L. Judd Company dated March 14, 1927; Defendant's Exhibit DD, letter from Judd & Co. to McGhee & Jinks dated March 31, 1926; Defendant's Exhibit J, certified copy of file wrap-

per and contents of patent in suit No. 1,475,306; Defendant's Exhibit K, British patent to French 28,885 of Dec. 16, 1912; Defendant's Exhibit L, British patent to Harrison of April 28, 1886; Defendant's Exhibit M, British patent to Timmis of June 23, 1910; Defendant's Exhibit N consisting of the following patents: Fay No, 15,226, dated July 1, 1856; Gunn No. 303,370, dated Aug. 12, 1884; Riggs No. 392,363, dated Nov. 6, 1888; Nash 404,102, dated May 28, 1889; Savage No. 728,769, dated May 19, 1903; Lacoin No. 751,305, dated Feb. 2, 1904; Bliemeister No. 1,170,601, dated Feb. 8, 1916; defendant's Exhibit O, patent to Ashmore No. 1,069,999, dated August 12, 1913; Defendant's Exhibit AA, certified copy of public record of Great Britain vised by the U. S. Consul at London; Defendant's Exhibit BB, petition for appeal filed Oct. 5, 1928; assignments of error filed Oct. 5, 1928; order allowing appeal entered Oct. 5, 1928; bond on appeal filed Oct. 8, 1928; praecipe.

I DO FURTHER CERTIFY that the fees of the clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to..............and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Southern Division, this............ day of February in the year of Our Lord One Thousand Nine Hundred and Twenty-nine, and of our Independence the One Hundred and Fifty-third.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.

By

Deputy.

No. 5743.

IN THE

United States Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

James W. McGhee and Edward C. Jinks, trading as McGhee & Jinks,
Appellants,

vs.

LeSage & Company, Inc., a corporation,
Appellee.

BRIEF ON BEHALF OF APPELLANTS.

LYON & LYON,
FREDERICK S. LYON,
HENRY S. RICHMOND,
Attorneys for Appellants.

FILED

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Appellants,
vs.
LeSage & Company, Inc., a corporation,
Appellee.

BRIEF ON BEHALF OF APPELLANTS.

This is a patent infringement suit. The case comes before this court upon an appeal by plaintiffs from a decree dismissing their bill of complaint. The district court found plaintiffs' patent

> "invalid in that it discloses no invention over devices made and marketed prior to the date of the patent application, and that plaintiffs' device was not new in the art; the court does not find that the device of plaintiff was specifically anticipated by such devices so made and marketed at such prior times." [Memorandum Opinion, Rec. 13-14.]

In other words, the district court, while specifically finding failure of "anticipation", found "want of invention".

Plaintiffs' position is that the record *proves* invention and that the district court's decree should be reversed.

The burden of proving "invention" is not upon plaintiffs. On the contrary, the burden is upon the defendant to prove want of invention beyond reasonable doubt. But plaintiffs submit that the record in this case demonstrates that invention was present.

Infringement is admitted. In fact, the district court says:

> "The court finds the device having been marketed by defendant, is substantially that described in the patent of the plaintiffs, * * *." [Memorandum Opinion, Rec. 13.]

The patent in suit is for a "Drapery Hook". It was issued November 27, 1923, No. 1,475,306. It was granted on an application filed September 23, 1922, for the invention of plaintiff James W. McGhee.

The invention was in an admittedly and acknowledged crowded art. In such crowded art the record shows this invention to have a very decided place. The utility and novelty of this invention is attested by its position in the field. Immediately upon its production it went into wide and extended use.

Plaintiffs submit that this case falls within the rule applied by the Supreme Court in *Diamond Rubber Co. v. Consolidated Rubber Co.*, 220 U. S. 426, at 440-1, wherein the court says:

> "The utility of the Grant patent, therefore, was not attained in the Willoughby patent. *The rubber company's conduct is confirmation of this.* It uses the Grant tire, as we shall presently see, not the Willoughby tires. Let it be granted that they afforded suggestions to Grant, and that he has *gone but one step beyond* them. It is conceded, as we have said, that his invention is a narrow one—a step be-

yond the prior art—built upon it, it may be, and only an improvement upon it. Its legal evasion may be the easier (Chicago & N. W. R. Co. v. Sayles, 554), and hence we see the strength of the concession to its advance beyond the prior art and of its novelty and utility by the rubber company's imitation of it. The prior art was open to the rubber company. That 'art was crowded', it says, 'with numerous prototypes and predecessors' of the Grant tire, and they, it is insisted, possessed all of the qualities which the dreams of experts attributed to the Grant tire. *And yet the rubber company uses the Grant tire. It gives the tribute of its praise to the prior art; it gives the Grant tire the tribute of its imitation, as others have done.* And yet the narrowness of the claims seemed to make legal evasion easy. Why, then, was there not evasion by a variation of the details of the patented arrangement? *Business interests urged to it as much as to infringement.* We can find no answer except that given by the tire company. 'The patented organization must be one that is essential. Its use in the precise form described and shown in the patent must be inevitably necessary.'

"That the tire is an invention is fortified by all of the presumptions—the presumption of the patent by that arising from the utility of the tire. And we have said that the utility of a device may be attested by the litigation over it, as litigation 'shows and measures the existence of the public demand for its use'. Eames v. Andrews, 122 U. S. 40, 55, 30 L. Ed. 1064, 1069, 7 Sup. Ct. Rep. 1073. We have shown the litigation to which the Grant tire has been subjected." (Italics ours.)

As said in *New York Scaffolding Co. v. Whitney*, 224 Fed. 452, at 457 (C. C. A. 8):

"Did the combinations of Henderson have the attribute of patentable novelty? They disclose simple and useful improvements. Their simplicity, however, is no bar to their patentability. 'The fact that the invention seems simple after it is made', says the Su-

preme Court, 'does not determine the question; if this were the rule, many of the most beneficial patents would be stricken down. It may be safely said that if those skilled in the mechanical arts are working in a given field, and have failed after repeated efforts to discover a certain new and useful improvement, that he who makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor.' Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 434, 435, 31 Sup. Ct. 444, 55 L. Ed. 527."

As said by Circuit Judge Davis in *Krauth v. Autographic Register Co.*, 285 Fed. 199, at 204:

"It is not difficult to follow, but it may be to lead. After a problem has been solved, it is comparatively easy to go back into the prior art, and take patent after patent, and select one element or principle from this one and another from that one, and thus bring together a combination which closely resembles the patented device, and which, when it has been done, seems to have required the exercise of mechanical skill only. It would, however, be unfair to determine invention by such methods. The most difficult problems, when solved and understood, seem simple. It is unnecessary to analyze in detail the various devices cited against Krauth's machine. It is sufficient to say that every one of them, when considered as a single, distinct device, is unlike his. The combinations and functions materially differ. None of these machines could do the work of Krauth's. While his patent is not basic, and he does not claim the discovery of a new principle, he brought together old principles into a new combination, which produced useful results and filled a long-felt need. He was therefore entitled to a patent. Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 435, 31 Sup. Ct. 444, 55 L. Ed. 527; Low, *et al.*, v. McMaster (C.

C. A.), 266 Fed. 518, 523; Wire Wheel Corporation of America v. Madison Motor Car Co. (D. C.), 267 Fed. 220."

As said by the Court of Appeals for the Sixth Circuit in *Sodemann Heat & Power Co. v. Kauffman*, 275 Fed. 593, at 596:

> "While the evidence justifies a finding that patentee's device is a combination of old elements, it also justifies a finding that a new result is produced by his device, which is more efficient than any heretofore known, to deflect, by the use of the shield in his device, the dust particles arising with the heat from the radiator, into a trough, which is also a part of his device, where they will be retained, and protect the walls and ceilings from the black dust and smoke arising from the radiator. A new combination of old devices, which increases the efficiency of old machines, or if a new useful result is produced, or even an old result in a more facile, mechanical, useful, or effective way, may be the subject of a valid patent. Cantrell v. Wallick, 117 U. S. 689, 694, 6 Sup. Ct. 970, 29 L. Ed. 1017; Continental Paper Bag Co. v. Eastern Paper Bag Co., 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Diamond Rubber Co. v. Consolidated Rubber Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; National Hollow Brake Beam Co. v. Interchangeable Hollow Brake Beam Co., 106 Fed. 693, 707, 45 C. C. A. 544; Ottumwa Box Car Loader Co. v. Christy Box Car Loader Co., 215 Fed. 362, 369, 131 C. C. A. 504; Wm. F. Goessling Box Co. v. Gumb, 241 Fed. 674, 679, 154 C. C. A. 432; Pelton Water Wheel Co. v. Doble, 190 Fed. 760, 111 C. C. A. 488; Neill v. Kinney, 239 Fed. 309, 313, 152 C. C. A. 297."

As said by the Court of Appeals for the Eighth Circuit in *Jensen-Salsbery Laboratories v. Salt Lake Stamp Co.*, 28 Fed. (2d) 99, at 102:

"In referring to the Eibel Case, in Trane Co. v. Nash Engineering Co., 25 F. (2d) 267, 269, the Circuit Court of Appeals of the First Circuit says:

'The Eibel Case certainly admonishes this court to give great weight to the practical results from a claimed invention; to look beyond the paper expression to the state of the art, before and after an alleged invention which is tested in actual practice. Dubilier Condenser Corp. v. N. Y. Coil Co. (C. C. A.) 20 F. (2d) 723, 725; Minerals Separation v. Hyde, 242 U. S. 261, 270, 37 S. Ct. 82, 61 L. Ed. 286. An invention is a real thing; a patent is the description of it in words and/or drawings. McClain v. Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. Ed. 800. The description must be reasonably adequate, in order to warn the public and competitors of the nature and extent of the monopoly claimed. But the essence of the matter is a new and useful reality, frequently best tested and demonstrated by actual experience.'

"See, also, Brown Bag-Filing Mach. Co. v. Drohen (C. C.), 140 F. 97; The Barbed Wire Patent, 143 U. S. 275, 12 S. Ct. 443, 36 L. Ed. 154; Hall Signal Co. v. General Ry. Signal Co. (C. C.), 168 F. 62; Force v. Sawyer-Boss Mfg. Co. (C. C.), 111 F. 902; Schenck v. Singer Mfg. Co. (C. C. A.), 77 F. 841; Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177."

Circuit Judge Learned Hand, speaking for the Court of Appeals, 2nd Circuit, in *R. Hoe & Co. v. Goss Printing Press Co.*, 30 Fed. (2d) 271, at 274, in discussing the issue of invention and stating that the court is without objective tests, says:

"The only reliable evidence is from the history of the art. White v. Morton, 20 F. (2d) 311 (C. C. A. 2): how long it had to wait for the supposed invention, what efforts had been made before, how long the need had existed, how successful was the answer. When all is said, the decision must in the end at times seem arbitrary."

By law, the decision of the Commisisoner of Patents and the granting of the patent is *prima facie* evidence of invention and of the validity of the patent. As said by Circuit Judge Morrow in *Bowers v. San Francisco Bridge Co.*, 91 Fed. 381:

> "The complainant starts with the presumption of law that * * * the patentee was the inventor. Evidence of doubtful probative force will not overthrow the presumption of novelty and originality arising from the grant of letters patent for an invention. It has been frequently held that the defense of want of novelty or originality must be made out by proof so clear and satisfactory as to remove all reasonable doubt * * *.
>
> "In Philadelphia Trust, Safe Deposit & Insurance Co. v. Edison Electric Light Co., 13 C. C. A. 43, 65 Fed. 554, Judge Wales, speaking of a defendant who sets up new matter, said:
>
> 'The uniform practice has been to require the defendant to place himself within the exception requiring him to prove his defense *beyond a reasonable doubt.*'"

As said in *Alliance Securities Co. v. J. A. Mohr & Son,* 14 Fed. (2d) 793, at 796 (affirmed by this court, 14 Fed. (2d) 799):

> "And invention cannot be denied solely because it is possible to select from prior patents the several elements which have been united by what, *after* the combination is known, appears to have required only mechanical skill. Krauth v. Autographic Register Co. (D. C.), 285 F. 199, 205, and cases cited.
>
> * * * * * * * * * *
>
> "Many things seem obvious after they have been done, which for years have escaped the search of experts, and knowledge gathered after an event invariably brings with it an under-estimation of the difficulties which it has overcome. For this reason the

law regards a change as evidence of novelty, and its acceptance and utility often as demonstration. Pearl v. Ocean Mills, *et al.*, 2 Barn. & A. 469, 19 Fed. Cas. p. 56, No. 10,876; Boyce v. Pyrene Mfg. Co. (D. C.), 290 F. 998, 1003. The merit of such inventions lies rather in the end reached than in the means employed. Indiana Novelty Mfg. Co. v. Crocker Chair Co. (C. C. A. 7), 103 F. 496, 501, 43 C. C. A. 287."

As said by this court in *Bankers Utilities Co. v. Pacific National Bank,* 18 Fed. (2d) 16, at 18:

> "In their position plaintiffs are fortified by the presumptions attending a patent (Wilson & Willard Mfg. Co. v. Bole (C. C. A.), 227 F. 607; Heinz Co. v. Cohn (C. C. A.), 207 F. 547; San Francisco C. Co. v. Beyrle (C. C. A.) 195 F. 516), and by the fact that their device is a commercial success and has brought on imitation (Application of McClaire (D. C.), 16 F. (2d) 351; Sandusky v. Brooklyn Box Toe Co. (D. C.), 13 F. (2d) 241; Carson v. Am. Smelting Co. (C. C. A.), 4 F (2d) 463; Murphy Wall Bed Co. v. Rip Van Winkle Wall Bed Co. (D. C.), 295 F. 748; Globe Knitting Works v. Segal (C. C. A.), 248 F. 495; Morton v. Llewellyn (C. C. A.), 164 F. 697."

The proofs show that plaintiffs have been manufacturing the patented drapery hooks since the latter part of 1923, and up to the trial had sold 60,000 gross thereof [R. 18]. The nominal defendant, LeSage & Company, had purchased these drapery hooks from plaintiffs [R. 62]. The actual defendant (H. L. Judd Company of New York), in order to appropriate to itself plaintiffs' business, duplicated plaintiffs' drapery hook and sold such duplications to the nominal defendant herein, thereby diverting plaintiffs' trade to it. This is made clear by the testimony of William H. Edsall, vice-president, and in charge of the manufacturing part of the business of the

H. L. Judd Company [R. 33]. He testifies that his office in New York furnished him with a carton of plaintiffs' hooks and that he had these hooks before him when he designed and started the manufacture of the infringing hooks. Mr. Edsall states:

> "The circumstances that caused us to commence the manufacture of such hooks at that time was probably the call from our representative on the coast. I mean that there was a demand for such a hook on the Pacific coast at that time. Our representative on the Pacific coast did not send samples of the McGhee hook directly to me, but I received the hooks from our New York office. I am unable to state whether I received the samples from our New York office through the mail or whether the sample was delivered personally. The sample furnished by the New York office was contained in a carton * * *. The carton was labeled, according to my recollection, substantially, 'one gross of hooks, patented, McGhee & Jinks, Manufacturers, Los Angeles'. That is my recollection. When I received this carton of McGhee & Jinks hooks, I recognized these hooks as being similar hooks that I had considered in 1921, and to which I referred in my correspondence, Plaintiff's Exhibit 200 to the deposition of William H. Edsall. By the use of the word 'similar', I mean that the hooks were identical in construction. It is my recollection that I was informed in 1921 that Mr. McGhee was going to apply for a patent on the hooks like Defendant's Exhibit 100 for Identification. I wrote to McGhee & Jinks direct. I had never had any direct correspondence with McGhee & Jinks in 1921 concerning these hooks. I cannot tell you why I did not seek the information from our Pacific coast representative. We did not have our patent attorneys make a search to find whether a patent had been issued to McGhee. We commenced manufacturing the alleged infringing hook about six months after receiving the sample of the McGhee hooks from our New York office in 1926. I cannot fix the day and month from my memory the first manufacture of the alleged infringing hook, but

I can obtain it from our records; but I would say it was in the late fall of 1926. I believed in 1926 that the McGhee mentioned on the label of the carton was the same McGhee who had had the matter of manufacturing the identical hook up with our company in 1921. I had before me at our plant in Wallingford, Connecticut, the McGhee & Jinks hook at the time we designed and manufactured the alleged infringing hook like Defendant's Exhibit 100 for Identification. Apparently the McGhee & Jinks hook and Defendant's Exhibit 100 for Identification are made of the same material, which is spring brass wire. They are both made for the same purpose, and, I assume, are sold in open competition with each other, and the purpose for which we manufactured the alleged infringing hook was to sell them to the trade in competition with the McGhee & Jinks hook." [Rec. 35-7.]

Plaintiffs submit that these facts bring this case within the doctrine of the *Diamond Rubber Case, supra,* and that the recognition by the trade, as well as the recognition of the defendant itself, proves the novelty and utility of the McGhee drapery hook invention. We wish to again call to the court's attention the fact that the district court did not find anticipation, but based its decree upon want of invention.

Immediately upon the invention of this drapery hook by plaintiff McGhee, it went into great and extensive use. While the actual defendant now contends "want of invention" *technically*, the record proves the actual trade and art recognized it as novel and filling a long-felt want. If the case be otherwise doubtful, these facts should be considered sufficient to support the *prima facie* validity of the patent, the burden of overcoming which rests upon defendant.

As said by this court in *Morton v. Llewellyn,* 164 Fed. 693, at 697:

> "Apart from the presumption of novelty that always attends the grant of a patent, the law is that where it is shown that a patented device has gone into general use, and has superseded prior devices having the same purpose, it is sufficient evidence of invention in a doubtful case. The Barbed Wire Patent, 143 U. S. 275, 292, 12 Sup. Ct. 443, 36 L. Ed. 154; Keystone Manufacturing Company v. Adams, 151 U. S. 139, 143, 14 Sup. Ct. 295, 38 L. Ed. 103; Irwin v. Hasselman, 97 Fed. 964, 38 C. C. A. 587; Wilkins Shoe Button Co. v. Webb (C. C.), 89 Fed. 982; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693, 707, 45 C. C. A. 544."

The Court of Appeals for the Eighth Circuit, in the recent case of *D. W. Bosley Co., et al., v. Wirfs,* 30 Fed. (2d) 667, at 668, said:

> "Its quick recognition as a useful article, and as a great improvement over other articles previously used, together with the usual presumption of its validity, were sufficient to warrant the court in upholding its patentability. Tompkins-Hawley-Fuller Co. v. Holden (C. C. A.), 273 F. 424; Temco Electric Motor Co. v. Apco Mfg. Co., 275 U. S. 319, 48 S. Ct. 170, 72 L. Ed. 298."

It is significant that, although the actual defendant (H. L. Judd Company) asserts it was in possession of the Tonks, Ltd. catalogue for years prior to the McGhee invention, such disclosure (as there is therein) did not in fact suggest this drapery hook to them, but *after* plaintiffs introduced it, such defendant *copied it* from plaintiffs.

Draperies and drapery hooks have been used since time immemorial. Yet this invention received instant recogni-

tion and adoption when produced by plaintiff McGhee in 1922.

As said by the Court of Appeals, Second Circuit, in *R. Hoe & Co. v. Goss Printing Press Co., supra*:

> "The only reliable evidence is from the history of the art. White v. Morton, 20 F. (2d) 311 (C. C. A. 2): how long it had to wait for the supposed invention, what efforts had been made before, how long the need had existed, how successful was the answer."

Defendants have offered in evidence a number of prior patents, showing the prior efforts of inventors; also the Catalogue of Tonks, Ltd., a large and old English brass-goods manufacturer; *but* these only show, in fact, prior unavailing efforts. This was recognized by the District Court, which said:

> "The court does not find that the device of plaintiff was specifically anticipated by such devices so made and marketed at such prior times." [Rec. 14.]

Although now defendant asserts such prior devices were equally efficient and advantageous, defendant does not make or sell them. On the contrary, defendant purchases plaintiffs' patented hook and *duplicates it.* We submit the case directly falls within the *Diamond Rubber Co. v. Consolidated Rubber Co. (supra)* rule and that "invention" is proved.

Before plaintiff McGhee's invention, the drapery hooks then being made and sold had to be sewed onto the draperies by hand [Rec. 18]. The patented hook is self-contained—requires neither sewing to the drapery, nor any supplementary or complementary attendant devices to fasten it to the drapery or to the pole or supporting de-

vice. It contains all the instrumentalities required. It is self-sufficient. It is simplicity itself.

As said by this court in *Kitchen v. Levison,* 188 Fed. 659:

> "It is urged that the improvement which the appellee made on the prior art was simple and obvious. It may be conceded that it was simple, but that fact alone does not deprive the invention of patentability. There may be the highest form of invention in some of the simplest improvements on the prior art."

As said by the Court of Appeals, First Circuit, in *Dececo Co. v. Gilchrist Co.,* 125 Fed. 293:

> "To obtain absolute simplicity is the highest trait of genius."

As said in *Expanded Metal Co. v. Bradford,* 214 U. S. 381:

> "The fact that the invention seems simple after it is made does not determine the question; if this were the rule, many of the most beneficial patents would be stricken down."

The Letters Patent in Suit.

The patent in suit, Plaintiffs' Exhibit 1 [Rec. 55-9] discloses a drapery hook made from spring brass wire, and best illustrated in Fig. 2 of the drawings of the patent in suit [page of drawings opposite Rec. 55]. This hook is what might be described as a double hook, one of the hooks to engage the fabric of the drapery and the other to directly engage the curtain or drapery rod. That portion of the hook which engages the fabric consists of a sharpened pin 9 which is so bent as to lie closely along the shank 8 so that when the pin 9 is inserted through the wall 16 of the hem of the drapery the wall 16 of the drap-

ery is held pressed between the pin 9 and the shank 8 by the spring action of the loop 10. In this manner the point 11 of the pin 9 is hidden and the point cannot either prick the fingers or become caught in the folds of the drapery or drop out of the fabric if the drapery is removed from the rods. To support the drapery, the loop 10 and the hem are held up by being pressed between the pin 9 and the shank 8. The great advantage of this hook over prior devices is the saving of time and expense. The patented hook can be put into the fabric of the drapery or removed therefrom without any loss of time or any damage to the fabric, while prior devices required considerable time for sewing and if to be removed necessitated cutting off with a knife or scissors, which rendered the fabric of the drapery liable to damage [Rec. 18].

The patent in suit contains only one claim. This claim is a pen picture of the drawings of the patent and of the plaintiffs' commercial device (Plaintiffs' Exhibit No. 5) and of the infringing devices as exemplified in Plaintiffs' Exhibit 3-A and Defendant's Exhibit 100.

Prior Art.

The defendant in its answer set up the following letters patent and publications as anticipations of the patent in suit [Rec. 10-11]:

United States Letters Patent No. 1,069,999 to Edith B. Ashmore, dated August 12, 1913.

British Patent No. 15,079 of 1910 to Anne Timmis.

British Patent No. 5,780 of 1886 to Henry C. Harrison.

British Patent No. 28,885 of 1912 to French, *et al.*

Page 5 of a Manufacturers Catalogue published June 9, 1882, published by James Whitefield & Sons of Birmingham, England [Plate opposite R. 134].

Page 136 of a Manufacturers Catalogue, published April 24, 1891, by James Whitefield & Sons, of Birmingham, England.

Page 62 of a Manufacturers Catalogue published in 1895, by Tonks, Ltd., of Birmingham, England [Plate opposite R. 133],

and at the time of the trial defendant introduced the following United States Letters Patent for the purpose of showing the state of the art:

McGhee, No. 1,334,661, patented March 23, 1920, Exhibit "H" [Rec. 63-a).

Fay, No. 15,226, patented July 1, 1856 [Rec. 105].

Dunn, No. 303,370, patented August 12, 1884 [R. 106-b].

Riggs, No. 392,363, patented November 6, 1888 [Rec. 109-a].

Nash, No. 404,102, patented May 28, 1889 [Rec. 112-a].

Savage, No. 728,769, patented May 19, 1903 [Rec. 115-a].

Lacoin, No. 751,305, patented Feb. 2, 1904 [Rec. 119-b].

Bliemeister, No. 1,170,601, patented February 8, 1916 [R. 123].

Ashmore, No. 1,069,999, patented August 12, 1913 [Rec. 129].

The *McGhee Patent 1,334,661* is a prior patent granted to the plaintiff J. W. McGhee. The device of this patent

shows a different mode of operation from that of the device of the patent in suit.

Quoting from the patent [Rec. 65]:

> "The drapery hook is applied by inserting the point 6 through one thickness of the fabric just above the line of stitching 12 and passing the point between the front layer of fabric 13 and the rear layer of fabric 14 and out through the rear layer of fabric 14 just below the line of stitching 12, so that the rear layer of fabric 14 will pass between the arm 3 and the finger 1, and so that the finger 1 will press the fabric against the arm 4."

The point 6 and the arch 5 constitute the hook which engages the curtain rod. In hanging draperies equipped with this prior McGhee hook, the person hanging them was liable to have his fingers pricked, and the sharp points of the hook would catch in the fabric of the drapery, which was one of the drawbacks that the plaintiff McGhee overcame in the patent in suit, as will be seen by the specification thereof:

> "* * * inasmuch as the sharp exposed points on the hook end frequently pricks the fingers of the person handling the drapery, and causing damage to the fabrics by becoming entangled therein." [R. 56.]

The *British Patent No. 28,885 of 1912 to French, et al.,* shows drapery hooks to be used in connection with curtain rings, with the exception of Fig. 6, which discloses a pin for engaging the fabric, together with a ring which was designed to be threaded onto a curtain rod—and not hooked on, as is the device of the patent in suit. The French devices were what are described as two-plane hooks. In order to impart spring action to the pin, loops of the wire were made in planes at right angles to the

plane of the pin and hook. The French device also requires the use of tape sewed onto the drapery, and to which the hook was applied, while in the device of the patent in suit no tape is used or is necessary in connection therewith. In the use of the devices of the French patent, the hook which engaged the eye of the curtain rod ring or the ring which engaged the curtain rod of Fig. 6 of this patent was held at right angles to the plane of the curtain. This was necessarily so, because [specification, Rec. 92]:

> "In forming the loops they are, preferably, arched transversely so as to ensure of the pin part *b* and the outer parts of the loops lying in the same plane, or in line with each other, see Fig. 3, and therefore when the hook is applied to a tape the loops cause the hook part *a* to lie in a plane at right angles to the face of the tape, see Figs. 5 and 6."

In the device of the patent in suit, all of these elements, to-wit: the pin 9, shank 8, and hook 7, lie in the same plane, and the hook is formed to pivot on the pin 9, as is disclosed in Fig. 1 of the drawings [R. 55]. This pivoting action in the devices of the patent in suit allows the drapery to hang on a curved or angled rod without any pulling or puckering of the drapery.

The *British Patent No. 5,780 of 1886 to Henry C. Harrison* was cited by the Patent Office during the prosecution of application for the patent in suit, and the Commissioner of Patents correctly adjudged invention present over this Harrison patent, which discloses a drapery hook to be used in connection with curtain rod rings, and, in Fig. 1, a half-round projection contacting with the pin to serve as a keeper for holding the drapery on the pin C, and a half-round projection contacting with the hook D to

serve as a keeper to keep the hook D from slipping out of the eye of the pole ring. The patent states [Rec. 96-7]:

> "The object of the projection A is for the pin C to press against and so prevent it slipping when fixed into the curtain, and so do away with the old safety pin arrangement.
>
> "The object of the projection B is for the hook D to press against so that when the latter is passed through the eye in the pole ring it does not readily slip out."

These features are also stressed in the claims of the Harrison patent [Rec. 97].

The *British Patent No. 15,079 of 1910 to Anne Timmis* discloses an entirely different mode of operation from that of the device of the patent in suit:

> "This invention relates to a curtain suspension device of the kind in which a tape or band with loops or attachments is stitched to the curtain, the loops or attachments providing means whereby the curtain can be affixed to hooks, curtain pole rings or like devices for connection with the curtain pole or rod.
>
> "The present invention consists in forming the hook or ring with an eye for the reception of thread by means of which the hook or ring can be stitched to the curtain tape, the said eye being situated in proximity to a loop or other holding device forming part of the hook or ring." [Rec. 101-2.]

All of the figures of the drawings of the Timmis patent disclose the eye 10 to be used for the purpose of sewing the hook or ring to the drapery. One of the objects or purposes of the invention of the plaintiff McGhee was to obviate the use of the needle and thread to attach his hooks to the drapery. Obviously, the disclosure of the Timmis patent does not teach anyone to practice the invention in issue.

Fay Patent 15,226; Dunn Patent 303,370; Riggs Patent 392,363; Nash Patent 404,102; Savage Patent 728,-769; Lacoin Patent 751,305, and Bliemeister Patent 1,-170,601, were introduced as Defendant's Exhibit "N" [Rec. 43]. No testimony was introduced explaining the relevancy of these patents, and as no claim is made for them we will touch upon each one briefly.

The Fay Patent 15,226 discloses a hook tag or hook for attaching tags to cloth or the like. The Dunn Patent 303,370 discloses a combined collar and necktie retainer. The Riggs Patent 392,363 discloses an eye-glass holder. The Nash Patent 404,102 discloses a device called a catch-pin. The Savage Patent 728,769 discloses a skirt-hook. The Lacoin Patent 751,305 discloses a necktie band fastener. The Bliemeister Patent 1,170,601 discloses a badge and pencil holder. Each of these is in a non-analogous art. There is no disclosure of how the device of either of these patents could be used as a drapery hook. They are totally foreign to the McGhee patented drapery hook and could not be used, without modification and reorganization, in the place thereof.

The *Ashmore Patent No. 1,069,999* discloses a drapery suspension pin for curtain rings. The H. L. Judd Company, manufacturer of the infringing hooks sold by appellee, has the exclusive manufacturing and sales rights under this patent [Rec. 31]. The device of this patent discloses an entirely different device, with an entirely different mode of operation, from that of the patent in suit. Miss Ashmore, the inventor, states [Rec. 130]:

> "This invention relates to hookpins especially adapted for hanging curtains, portieres and other

draperies in connection with the rings of curtain poles.

"The object of the invention is to provide a pin of this character which, combining the properties of simplicity of construction, cheapness of manufacture and facility of application, will lie approximately flat with the plane of the fabric, holding it straight and preventing it from flopping or falling over will not tear the fabric and will have a substantial frictional locking contact therewith."

Quoting further:

"This drapery suspension hookpin is composed of wire in one piece and comprises two outer upturned U-shaped hooks 10 and 20 laterally spread in approximately the same plane, their inner legs 12 and 22 diverging downward the outer upturned legs 11 and 21 having sharpened prongs 13 and 23, and an intermediate down-turned tongue 30 composed of two wires 31 and 32 united respectively by return bends 33 and 34 with the upper end of said diverging inner legs 12 and 22 of said upturned hooks and at their lower ends with each other by a return bend 35. The tongue is preferably spread slightly at its lower end and bent inward approximately to the plane of said spread upturned hooks."

From this description it is plain to be seen that the device is absolutely and entirely different from the device of the patent in suit. The Ashmore pin can only be used in conjunction with curtain rings, while the McGhee device is used without curtain rings and is an entirely self-contained device for engaging the drapery and supporting the drapery on the curtain rod. The device of the Ashmore patent engages and at all times remains in the same parallel plane to the plane occupied by the curtain or drapery and also engages the curtain or drapery in two parallel places, while the device of the patent in suit engages the

curtain or drapery at only one point and the hook which engages the curtain rod is free to pivot in an arc of 180 degrees.

Page 5 of Manufacturers Catalogue published June 9, 1882, discloses a great many forms of curtain hooks, rings and pins. The devices referred to by defendant are the devices numbered 690 and 691 in the upper right-hand corner of the plate opposite Rec. 134. These devices here pictured disclose wire formed in the shape of a somewhat depressed letter "S", or in three parallel lengths.

Page 62 of Tonks, Ltd. Catalogue discloses a great many forms of brass curtain hooks. The device especially referred to by the defendant is in the middle of the plate opposite Rec. 63, numbered 200. In appearance, this device seems something akin to the devices of the Whitehouse catalogue, mentioned above, excepting that the two ends of the parallel bars touch the looped ends thereof. As there is a great similarity in these two exhibits, we will group them together for consideration. These devices—in fact, all of the devices pictured on the respective pages of the catalogues—are curtain hooks or drapery hooks to be used in connection with curtain pole rings, and these devices, No. 200 in Tonks, Ltd. Catalogue, and 690 and 691 of the Whitehouse Catalogue, could not be used for the same purpose as the device of the patent in suit, without having substantial changes made therein. These catalogues contain no description of manner of use. The "printed publications" (in Patent Law sense) afford only pictures of the exact devices. These pictures are the whole disclosed "public knowledge". It would be impossible to take any one of these three devices and use them as plaintiffs' patented drapery hook is used. To so *change*

them as to render them capable of performing the functions of plaintiffs' patented device, and assert "want of invention" over such hypothetical changed form, is not to judge by what the prior art actually shows. As said by this court in *Stebler v. Riverside Heights Ass'n*, 205 Fed. 735, at 738:

> "As we had occasion to say in Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 C. C. A. 446:
>
> " 'It is not sufficient, to constitute an anticipation, that the devices relied upon might, by a process of modification, reorganization, or combination, be made to accomplish the function performed by the device of the patent. Western Elec. Co. v. Home Tel. Co. (C. C.) 85 Fed. 649; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Gunn v. Bridgeport Brass Co. (C. C.) 148 Fed. 239; Ryan v. Newark Co. (C. C.) 96 Fed. 100; Simonds R. M. Co. v. Hathorn Mfg. Co. (C. C.), 90 Fed. 201-208; Gormully & J. Co. v. Stanley Cycle Co. (C. C.) 90 Fed. 279; Merrow v. Shoemaker (C. C.) 59 Fed. 120."

In one of these decisions so cited, it is said:

> "The force of this ruling, and the similar ruling in Clough v. Barker, 106 U. S. 175, 1 Sup. Ct. 188, is made manifest, in its practical application to the rights of parties, by the reflection that all earlier patents set up in defense against a later patent sued upon are but the record evidence of the status the art has reached. The rights under such later patent are subject to what this record evidence actually shows. To change this record, by permitting theoretical modifications of these earlier patents, would be the same, in principle, as to change, by interpolation or modification, any other evidence between the parties." (*Western Electric Co. v. Home Tel. Co.*, 85 Fed. 649, at 656.)"

Modification and redesigning of any one of these devices would be required in order to permit them to be used as

and for plaintiffs' patented hook, for the reason that should the drapery be pierced by the sharpened pin of any one of these three hooks and then it be sought to change the other portion of the hook so as to engage a rod, it would be found that there was not enough stock to make the arch and hook of the device for this purpose. Therefore, in order to make any one of these prior forms perform the functions of the McGhee patented hook, it would be necessary to shorten the pointed pin and the shank opposite it and increase the length of stock so as to provide material from which to make the arch and hook of the McGhee device. It is obvious that an entire reorganization and redesigning of the parts of these three devices would be required in order to produce a drapery hook which could be used as and for the McGhee hook.

The Tonks, Ltd. Catalogue [Rec. 133] contains no description of the various devices illustrated on page 62 of such catalogue, nor does it contain any description of the manner of use of any such devices. Material reliance in the lower court is placed upon the drawing or cut identified as Figure 200. It is obvious that this bent wire or brass design could not be used as and for plaintiffs' McGhee patented drapery hook. This falls within the rule stated by the Supreme Court in *Carnegie Steel Co. v. Cambria Iron Works*, 185 U. S. 425:

> "This defense presents the common instance of a patent which attracted no attention and was commercially a failure, being set up as an anticipation of a subsequent patent which has proved a success, because there appears to be in the mechanism described a possibility of its having been, with some alterations, adaptable to the process thereafter discovered."

There is no evidence in the record that such a hook as the one depicted in Figure 200 of this Tonks, Ltd. Catalogue was ever used or ever existed in the United States of America. A foreign patent or a foreign publication is only to be considered if it actually shows and describes. The rule has been expressed in this court as follows:

> "A foreign patent is to be measured as anticipatory, not by what might have been made out of it, but by what is clearly and definitely expressed in it. An American patent is not anticipated by a prior foreign patent, unless the latter exhibits the invention in such full, clear, and exact terms as to enable any person skilled in the art to practice it without the necessity of making experiments. Seymour v. Osborne, 11 Wall. 516, 555, 20 L. Ed. 33; Hanifen v. Armitage (C. C.), 117 F. 845; Permutit Co. v. Harvey Laundry Co. (C. C. A.), 279 F. 713; General Electric Co. v. Hoskins Mfg. Co., 224 F. 464, 140 C. C. A. 150. In Westinghouse Airbrake Co. v. Great Northern Ry. Co., 88 F. 258, 31 C. C. A. 525, the court said: 'The prophetical suggestions in English patents of what can be done, when no one has ever tested by actual and hard experience and under the stress of competition the truth of these suggestions, or the practical difficulties in the way of their accomplishment, or even whether the suggestions are feasible, do not carry conviction of the truth of these frequent and vague statements.'"
>
> (*Carson v. American Smelting & Ref'g. Co.*, 4 Fed. (2d) 463, at 465.)

Clearly, if a foreign patent having some description therein is to be thus strictly construed, much more so a mere cut in a trade catalogue, not accompanied by any description of any kind, is clearly subject to even stricter interpretation. As said by this court in *Consolidated Contract Co. v. Hassam Paving Co.,* 227 Fed. 436, at 441:

"The rule is that a description in a prior publication, in order to defeat a patent, must contain and exhibit a substantial representation of the patented improvement in such full, clear and exact terms as to enable any person, skilled in the art or science to which it appertains, to make, construct, and practice the invention patented. It must be an account of a complete and operative invention, capable of being put into practical operation. Seymour v. Osborne, 78 U. S. (11 Wall.) 516, 20 L. Ed. 33."

As said in *Underwood Typewriter Co. v. Elliott-Fisher Co.*, 165 Fed. 927, at 930:

"It is well settled that to constitute anticipation the prior patent or publication relied upon must, by descriptive words or drawings, or by both, contain and exhibit a substantial representation of the patented improvement in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention. Also anticipations of patents must be proven by evidence so cogent as to leave no reasonable doubt in the mind of the court. Seymour v. Osborne, 11 Wall. 516-555, 20 L. Ed. 33; Sewall v. Jones, 91 U. S. 171, 194, 196, 23 L. Ed. 275; Cohn v. U. S. C. Co., 93 U. S. 366, 370, 23 L. Ed. 907; Bates v. Coe, 98 U. S. 31, 44, 25 L. Ed. 68; Deering v. Winona etc., 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153; Crown Cork & Seal Co. v. Standard Stopper Co. (C. C.), 136 Fed. 199. In this case it was held that:

'A prior publication in a paper, patent, or otherwise will not negative the novelty of an invention unless it describes a complete and operative invention capable of being put into practical operation, or contains such a disclosure of the invention that any omission would ordinarily be supplied by one skilled in the art.' (Per Townsend, C. J.)"

As said in *Seymour v. Osborne*, 11 Wall. 516, 560:

"Patented inventions cannot be superseded by the mere introduction of a foreign publication of the

kind, though of prior date, unless the description and drawings contain and exhibit a substantial representation of the patented improvement, in such full, clear and exact terms as to enable any person skilled in the art or science to which it appertains to make, construct and practice the invention to the same practical extent as they would be enabled to do if the information was derived from a prior patent. Mere vague and general representations will not support such a defense, as the knowledge supposed to be derived from the publication must be sufficient to enable those skilled in the art or science to understand the nature and operation of the invention, and to carry it into practical use. Whatever may be the particular circumstances under which the publication takes place, the account published, to be of any effect to support such a defense, must be an account of complete and operative invention capable of being put into practical operation. Web. Pat. Cas., 719; Curt. Pat. (3d ed.), sec. 278, a; Hill v. Evans, 6 Law T., N. S., 90; Betts v. Menzies, 4 Best & S., Q. B. 999."

See also:

Permutit Co. v. Harvey Laundry Co., 274 Fed. 937, at 940.

As said in *Robinson on Patents*, Vol. 1, p. 450, Sec. 329:

"The invention described in the publication must be identical in all respects with that whose novelty it contradicts. The same idea of means in the same stage of development, as that which the inventor of the later has embodied, must be thereby communicated to the public."

As said in *Railroad Supply Co. v. Hart Steel Co.*, 222 Fed. 261, at 273 (C. C. A. 7):

"It is not enough that a prior art device approach very near the idea of the patent in suit; it must so clearly disclose the idea that it would be apparent to a

mechanic of ordinary intelligence who was not examining the device for the purpose of discovering in it the idea of the patent. For, if he already had that idea, he would not be getting it from the prior art device, but from his own imagination or some other source. Clough v. Barker, 106 U. S. 166, 1 Sup. Ct. 188, 27 L. Ed. 134; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658; Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275; Diamond Rubber Co. v. Consolidated Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527; Ryan v. Goodwin, 3 Sumn. 514, Fed. Cas. No. 12,186; Regent Mfg. Co. v. Penn. Elec. Co., 121 Fed. 80, 57 C. C. A. 334; Faries Mfg. Co. v. Brown & Co., 121 Fed. 547, 57 C. C. A. 609; Ideal Stopper Co. v. Crown Cork & Seal Co., 131 Fed. 244, 65 C. C. A. 436; Wm. B. Scaife & Sons Co. v. Falls City Woolen Mills, 209 Fed. 210, 126 C. C. A. 304."

See also:

Vaco Grip Co. v. Sandy MacGregor Co., et al., 292 Fed. 249, at 253.

Clearly, the device of Figure 200 of Tonks, Ltd. Catalogue could not be as and for the purpose of plaintiffs' patented hook. As this device is shown in said Figure 200, it must be used in a different manner. It is not so constructed that it could within itself embrace a curtain pole. Other changes would be required. It therefore is clear that it is not an anticipation, nor does it show want of invention in the device of the patent in suit. This court, in *Los Alamitos Sugar Co. v. Carroll*, 173 Fed. 280, applied the rule that a device which does not operate on the same principle as that of the patented device cannot be an anticipation. This rule applies with reference not only to this Tonks, Ltd. Catalogue and to the other catalogues introduced in evidence, but to the respective prior patents. Plaintiffs' McGhee hook operates upon a different prin-

ciple and a different mode of action. Immediately upon its introduction it had great commercial success, attesting its novelty and attesting the inventive character of its production.

The catalogues of Tonks, Ltd. and Whitehouse (Defendant's Exhibits A and B, respectively) are mere circulars to the trade and were not open to the public. The testimony of the witness John William Whitehouse was to the effect that Exhibit B, Whitehouse Catalogue, was never deposited in a library or other place open to the public, and only distributed to ironmongers, house furnishers and shop fitters [Rec. 46]. The witness Harold Norman Wright testified that he had no knowledge of whether any copy or copies of the Tonks, Ltd. catalogue, Defendant's Exhibit A, were ever deposited in the library or any other place open to the public prior to September 22, 1920 [R. 49]. The witness Wright further testified that this catalogue was distributed mainly to ironmongers and hardware dealers [Rec. 48]. Upon the offer of these exhibits in evidence by the defendant, plaintiffs objected to the offer, calling attention to the fact that these catalogues were not publications such as required by the Patent Statutes [Rec. 21-2].

That catalogues of this character are not publications, has been uniformly held by the courts.

> "The only remaining reference is the 'Dreyfuss Album.' It is a book of printed drawings, representing different forms of iron fabrics made by a Paris manufacturer, and bears the imprint of 1861. Under the head of 'Corners' is a drawing representing a transverse section of an iron column, corresponding with one of the figures referred to in the specification of Reeves. When this book was printed does not

appear, otherwise than presumptively from the imprint on its title-page. When it was published or put in circulation does not appear at all, except that possession of it was obtained by the respondents after the institution of this suit.

"Section 15 of the patent act of 1836 (*supra*)—and it has been incorporated in the act of 1870 (16 Stat. 198)—provides that a patent may be successfully opposed by showing that the thing patented 'had been described in some public work anterior to the supposed discovery thereof by the patentee'. It is obvious that this provision requires, first, a description of the alleged invention; second, that it shall be contained in a work of a public character and intended for the public; and, third, that this work was made accessible to the public by publication before the discovery of the invention by the patentee.

"Whether the work in evidence is a public or only a private work, intended merely for private circulation, is fairly a disputable question. It contains an illustration, by a drawing, of the thing intended to be represented, without verbal description; and whether this is a description at all, or such a one as the act contemplates, may well be denied on the authority of Seymour v. Osborne, 11 Wall. (78 U. S.) 516, and the cases there referred to with approval."

(*Reeves v. Keystone Bridge Co., et al.*, 5 Fish. 456, Fed. Case No. 11,660, 20 Fed. Cas. 466, at 471.)

In the case of *Union Tool Co. v. Wilson & Willard Mfg. Co.*, 237 Fed. 837, Judge Cushman held:

"An oil well supply catalogue of 1900 was introduced in evidence containing a cut of the Canadian underreamer; but such a catalogue is not a sufficient publication to establish anticipation. 30 Cyc. 837, 3-B."

See also:

Judson v. Cope, 16 Fish. 615, Fed. Case No. 7565, p. 13;

Persons v. Colgate, 15 Fed. 600, 602;

New Process Fermentation Co. v. Koch, 21 Fed. 580, 587;

Seymour v. Osborne, 78 U. S. 516, 20 L. Ed. 33;

Britton v. White, 61 Fed. 93, 95.

But even though the court were to hold that these catalogues are publications within the definition of the statute, then there is not such a disclosure in these catalogues as would make the device of plaintiffs' patent the obvious result of mere mechanical skill. The defendant's witnesses have stated that although they had the self-same catalogues in their possession from 1882 and 1895, respectively, and had studied them for inspiration for manufacturing drapery hardware, and though they may have seen and most probably did see the drapery hooks now so strongly relied on for anticipation, they received no inspiration to design a drapery hook like Defendant's Exhibit 100 and Plaintiffs' Exhibit 3-A. R. D. H. Vroom, salesmanager of, and a large stockholder in, H. L. Judd Company, testifies as follows:

> "I stated on redirect examination that upon the delivery of these old records and catalogues to me in December, 1911, that I reviewed them with the purpose of manufacturing some of them for sale by our company. We made items that were similar to those shown in the catalogues. I got my inspiration from those old catalogues for those articles that our company manufactured. In the review of these old catalogues, I did not find anything therein that gave me the inspiration to manufacture a drapery hook like Defendant's Exhibit 100 for Identification. In my review of these catalogues, I probably saw the Tonk's hook No. 200 on page 62, but paid no attention to it." [Rec. 41.]

The catalogues, Defendant's Exhibits A and B, did not disclose the invention of the patent in suit to those skilled in the art. The record amply proves this. Mr. Vroom is a man 55 years of age, who has spent his entire life in the upholstery and drapery hardware business, and he frankly admits in his testimony that these drapery hooks, pictured in these catalogues, Defendant's Exhibits A and B, did not disclose to him how to make the McGhee hook. We submit that, as it was not obvious to the witnesses Day, Edsall and Vroom, the president, vice-president in charge of manufacture, and the salesmanager, respectively of H. L. Judd Company, the actual defendant in charge of the defense herein, from an intimate knowledge of these catalogues, how to make the hook of the patent in suit, and it was necessary to obtain samples of the McGhee hook for copying, that novelty and invention is demonstrated in the device of the patent in suit.

Plaintiff McGhee conceived a novel construction having a novel method of use or mode of operation, not disclosed in anything that was prior. The specific invention which he made was patentable, and the patent granted thereon should be sustained.

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Frederick S. Lyon,
Henry S. Richmond,
Attorneys for Appellants.

No. 5743.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

James W. McGhee and Edward C. Jinks trading as McGhee & Jinks,

Appellants,

vs.

LeSage & Company, Inc., a corporation,

Appellee.

BRIEF FOR APPELLEE.

RAYMOND IVES BLAKESLEE,
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FILED
MAY 13 1929
PAUL P. O'BRIEN,

Parker, Stone & Baird Co., Printers, Los Angeles.

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BRIEF FOR APPELLEE.

In this appeal from the final decree of the District Court for the Southern District of California, Southern (now Central) Division [Tr. 14], which dismissed the bill of complaint, opinion by Judge James [Tr. 13], there is involved a patent to James W. McGhee, of plaintiffs-appellants, No. 1,475,306, *for a bent piece of wire,* so conformed as to produce two loops, one loop to be hung over a curtain rod or pole and the other loop to be engaged with a curtain or drapery, thus sustaining the latter or suspending it from such rod. The end of the bent piece of wire which extends into the latter or curtain-sustaining

loop is pointed or sharpened to be readily passed through the fabric [Tr. 83]. The alleged invention of this patent was not the first attempt of McGhee to bend a piece of wire into shape for supporting a curtain or drapery. In 1919, over three years before he filed his application for the patent in suit, he applied for another patent which was issued March 23, 1920, No. 1,334,661 [Tr. 64]. That device had similarly two main loops and a pointed end for passing through the fabric, one loop passing over the curtain rod and the other accommodating the fabric. This earlier patent of McGhee's thus contains every element of the bent wire formation shown in the patent in suit, with the additional element of a spring coil, 3, tending to pinch the fabric between the finger, 1, and the arm, 4 [middle of page 65, Tr.]. In this earlier form the other end of the wire was sharpened or pointed. There was absolutely no novel *conception* in the device of the second McGhee patent. In effect it amounted to merely an elimination of the spring coil, 3, and sharpening the other end of the wire. The second McGhee patent taught nothing new over the first McGhee patent. While the first McGhee patent would have been as pertinent to the second McGhee patent had it been the patent of someone else, it is interesting to study in connection with the patent in suit in the particular respect that *it cancels out of the picture any possible novel conception by McGhee in his devising of the bent wire of the patent in suit.* And we shall see that much further prior art was even closer in detail to the bent wire of the patent in suit than was McGhee's earlier effort.

Conception Necessary to Invention.

In a decision by the Circuit Court of Appeals, First Circuit, *Thacher v. Inhabitants of Town of Falmouth,* 241 F. R. 869, in which the appellate court affirmed a decree for defendant, there was involved a patent for an improvement in concrete arches, including pairs of metal bars in the arch (p. 870). The court said, at page 874, on this question of mere mechanical skill or engineering in contradistinction from inventive thought:

> "We are unable, as was the District Court, to find inventive thought going beyond mere mechanical improvement involved in any advance made by the plaintiff upon the methods of concrete arch reinforcement whose use had become open to the public, as above. As is said in the opinion of the learned District Judge:
>
> 'Variations of size of wires do not constitute invention; widening the spaces between the bars, to enable an engineer to use coarse concrete, is not invention; dispensing, in whole or in part, with unessential parts, is not invention; producing economy in bridge building by consolidating numerous small bars into one large bar, cannot be said to be invention. These things are mechanical; they relate to good engineering; they do not disclose inventive thought.'
>
> Finding no error, therefore, in the conclusion of the District Court that the claims in suit are invalid, the patent not disclosing patentable invention, we have no occasion to consider the question of infringement by the defendant."

Inventive thought with a conception is necessary to all inventions. First, the inventor must conceive of steps to be taken or employed, and then embody the conception in actual or concrete form. There was nothing remaining

over and beyond the first McGhee patented device which could constitute conception or inventive thought as entering into or sustaining and devising of the second patented McGhee hook. The same is true with respect to the second patented McGhee hook and the rest of the prior art.

That there could be no inventive conception in bending a piece of wire into the shape of that of the patent in suit, which is very analogous to that of an ordinary pot hook, is likewise within the reasoning of the Circuit Court of Appeals for the Second Circuit in *Fernand v. Oneida National Chuck Co.,* 174 F. R. 1020. The decision *per curiam* is brief and is as follows (p. 1021):

> "Appellant criticizes the opinion of the Circuit Court on the ground that it 'took judicial notice' of the thill couplings of the prior art. But it was not necessary to find any prior art other than such as the patent itself discloses. It is manifest from the patentee's own statements that all he did was to bend over or clinch the ends of the wire link, so as to prevent their slipping out of the apertures in which they were inserted. Of course, to do this he had to enlarge the interior of the aperture sufficiently to turn them. No amount of evidence, expert or other, could possibly raise such an obvious expedient to the dignity of an invention. The decree is affirmed, with costs."

So much at the outset in support of the memorandum opinion of Judge James [Tr. p. 13], in which he said "* * * the court finds that said patent of plaintiff is invalid in that it discloses *no invention* over devices made and marketed prior to the date of the patent application, and that plaintiff's device was not new in the art; * * *." It is also true that devices of prior patents and publications, irrespective of the making or marketing of such devices, support the holding that the patent discloses "no invention," and these further things support the finding that it "was not new in the art." (Italics ours.)

Conception Lacking—No Invention.

This court some years ago, in *Towne Steering Wheel Co. v. Lee,* 199 F. R. 777, opinion by Your Honor Judge Gilbert, affirmed a decree for defendant entered upon the sustaining by the late Judge Wellborn of a demurrer to the appellant's bill which brought suit for the infringement of a patent for "a steering wheel for auto-vehicles." The claims were for a steering wheel having a rim with a smooth outer surface and an indented inner surface. The purpose of the alleged invention was to permit the fingers of the operator to tightly grip the wheel and hold the same from slipping. The question presented on the appeal, said Your Honors, page 778, was "whether the court below erred in sustaining the demurrer to the bill for want of patentable novelty in the device described in the patent." The opinion goes on to state:

> "The appellant argues that regard should be had to the allegations of the bill—which must be taken as true—averring that the trade and the public have generally accepted and acquiesced in the validity and scope of the patent, and that the invention has been extensively practiced and has gone into great and extensive use, and that those allegations made it incumbent upon the court below to allow the appellant the opportunity of proving those facts in aid of the presumption of novelty which arose from the issuance of the patent. That argument would be persuasive if there were room for doubt on the question of the novelty of the device. But we find no room for doubt. In Dunbar v. Meyers, 94 U. S. 187, 24 L. Ed. 34, it was said: 'The Patent Act confers no right to obtain a patent except to a person who has invented or discovered some new and useful art, machine, manufacture, or composition of matter, or some new and useful improvement in one or the other of those described subject-matters.' It is common knowledge that the expedient of roughening and

corrugating the surfaces of handles of various implements is very old, and instances may be found in the handles of tennis rackets, fishing rods and baseball clubs, and that the handles of swords and knives from time immemorial have been indented on the inner side so as to render more firm the grasp of the fingers. In Appleton's Encyclopedia of Applied Mechanics, there appears a cut showing a round indented circular handle of a valve with an indented outer surface so made for the purpose of giving a firmer handhold upon the handle."

And so, in the case at bar, it is common knowledge that wires may be bent into any sort of serviceable shape for hooking and engaging objects and fastening objects together and may be sharpened to produce penetrating ends. This is how farmers use hay-wire. In an inconceivable number of forms wire has been twisted and bent to adapt itself, by its ready pliability, to service for multitudinous ends and purposes. Had it not been for McGhee's first drapery hook attempt plus all the other prior art, no invention would have inhered in bending a piece of wire into oppositely directed loops and sharpening one of the wire ends. There was no novelty in the shape, no novelty in function and no novelty in performance over a wide range of expedients made of bent wire or rods previously used, and extending in kind from fish hooks to pot hooks.

So much to stress in limine the fatal *character* of the thing which the Patent Office was persuaded to recognize by patent. It is neither an art, machine, composition of matter nor an article of manufacture capable of having the quality of *invention* required under the statute of all patentable things, in view of notoriously old wire bendings.

File Wrapper and Contents of McGhee Patent.

When we turn to the record of the application for the patent in suit [Tr. p. 66] we are still more amazed that this piece of bent wire could be recognized as arising to the dignity of invention. Four claims were originally presented [Tr. p. 72]. All of them were rejected by first action of the Patent Office, British patent to Harrison [Tr. p. 94] (cut opposite Tr. p. 97) being cited against the claims. Harrison plainly shows the two loops in a piece of wire disposed and arranged as does McGhee, the device being a curtain hook, and one end of the wire, adjacent to the curtain-supporting loop, being pointed. The only appreciable difference between McGhee and Harrison is that Harrison puts in a couple of extra bends in the wire, one of same tending to tightly pinch the fabric. Elimination of these bends would certainly not amount to invention. In the reply to this rejection McGhee's attorney cancelled claims 1 and 4 and in the remaining claims inserted the word "spring" before the word "loop" [Tr. p. 76]. This could not constitute invention because every bent wire has inherent spring qualities. Of these two remaining claims, claim 1 was next rejected and claim 2 allowed. After further correspondence claim 1 was again rejected. It was then ordered cancelled by McGhee's attorney and the application was then allowed with its single claim, which became the single claim of the patent. It will be noted that the Harrison patent was the only prior art cited by the Patent Office. We admit that it was close enough, and contend it was sufficient to warrant the rejection not only of the three claims that were cancelled, but also of the fourth claim which became that of the patent in suit. We do

not understand how the claim was allowed over the rejected claims. Compare it with original claim 2 as amended. The only difference consists of the following language:

Cancelled Claim 2.	*Claim of Patent.*
one side of said hook constituting a shank, the end of the shank being bent to form a spring loop, an arm extending upwardly from the spring loop and disposed adjacent the shank and terminating near the hook bend,	to provide an arch, a hook end and a shank portion, the end of the shank portion being bent to form a spring loop, and an arm extending upwardly from the loop disposed along the outer edge of said shank and terminating adjacent the junction between the shank and arch,

We contend that the language in each instance means the same thing in all fairness, and that there is nothing in the claim of the patent *in substance* that was not present in the language of cancelled claim 2. Under the settled rule, acquiescence in the rejection of a claim and cancellation of said claim prevent the patentee from asserting for any other claim the meaning and scope of the cancelled claim. *Schultheiss Co. v. Phillips,* 264 F. R. 971, a decision of this court, citing other decisions by it. The claim must be strictly construed. And being the same in substance as original claim 2, we contend that, in cancelling original claim 2 as amended, together with the cancellation of the other original claims, McGhee struck out from under the remaining claim all substance for which he might otherwise, by appeal, have made contention for patentability, had there been any structural

distinction between his device and the prior art, or had there been present anything patentable in nature and kind.

As the Patent Office overlooked the earlier McGhee patent and the other prior art to be discussed later, and did not indeed consider Harrison sufficient in and by itself to meet the claim of the patent, then the burden was upon the lower court (and the lower court accepted such burden) of considering *de novo* those examples which the Patent Office overlooked. We contend here as we did before the lower court, that the whole prior art meets every slightest particularity of the claim which was allowed, unless it be with respect to dimensions totally inconsequential.

Real Anticipation.

We, therefore, believe that the lower court quite properly could have gone further and found the patent in suit absolutely anticipated as well as invalid for want of invention. While the legal distinction exists and is technically proper, we believe it need not have been drawn in the present case, and that the single claim of the patent in suit is totally void both for want of invention and anticipation.

Prior Art.

Defendant put before the court quite extensive prior art in addition to the single citation, Harrison, made by the Patent Office. We have already adverted to the earlier McGhee patent which in structure, nature, function and purposes so thoroughly occupied the field of the present alleged invention that there was nothing left to

warrant issuance of the patent in suit. When to this prior art is added the Harrison patent and the other prior devices about to be discussed, we can entertain no doubt that the Patent Office would certainly have refrained from issuing the patent in suit with its single claim had such further prior art come to its attention or been discovered by it.

We might take up these other examples in the order in which they appear in the transcript. The first of these is British patent to French, Defendant's Exhibit K [Tr. p. 87], No. 28,885 of 1912, many years before both of the McGhee attempts. The drawing [opposite Tr. p. 93] of this curtain hook shows clearly a pointed length of wire with two main loops, having the same principle, mode of action and arrangement of members as in the patent at bar. If the court will compare Fig. 6 with Fig. 2 of the patent in suit, this will be apparent. It may be truthfully said that all that McGhee did was to eliminate some of the bends and curvatures in the French device. No new feature or accomplishment is imported by such elimination.

Skipping now over Harrison, *supra,* we come to the Timmis British patent No. 15,079 of 1910, also an early patent. The cut is opposite Tr. p. 103. And this device is also for the identical purpose and use that the McGhee device serves. We suggest comparison of Fig. 6 of this cut with Fig. 2 of the McGhee patent. We find the opposite bends and almost identical formation. The loop 5 goes over the pole or rod such as shown in Fig. 1, and the curtain is suspended by the other loop by means of loop 11 stitched to the curtain. Whether the curtain

have a loop on it as in Timmis or the curtain be impaled upon the hook by passing the pointed end through the latter, as in Harrison, for instance, is matter of selection and choice.

Next in order is the hook tag of Fay, U. S. patent issued over sixty years before McGhee's activities, No. 15,226 of July 1, 1856. The tag is carried by a loop in the hook E and by means of a sharpened point, the material to which the tag is to be applied is impaled upon the hook. Obviously, this device could be strung onto a curtain rod and have the identical performance of the McGhee device. There is a substantial identity of structure.

The Gunn device [cut opposite Tr. p. 106b] is not for the identical purpose of the McGhee device, but has a bent metal formation quite similar, as may also be said of the Riggs device [opposite Tr. p. 109a]. Both Gunn and Riggs are of considerable antiquity. The catch pin of the Nash patent of 1889 [cut opposite Tr. p. 112a] shows a similarly bent piece of wire having oppositely directed loops with one end pointed. Similar formation is shown in the Savage skirt hook patent, issued in 1903 [cut opposite Tr. p. 115a]. Similar sharpened and bent metal formation is shown in U. S. patent to Lacoin of 1904 [cut opposite Tr. p. 119b], and the same structural idea of opposite loops in bent wire having one end sharpened is found in Bliemeister U. S. patent of 1916 for a holder or means of suspension. [Cut opposite Tr. p. 123.] In 1913 there was issued the Ashmoee U. S. patent [cut opposite Tr. p. 129], which is a drapery suspension pin for curtain rings. This patent discloses a

bent wire formation for hooking on to curtain rings on a curtain pole 70 with sharpened ends or "prongs" for passing through the fabric of the curtain. It will be noticed that the specification of this patent [Tr. p. 131] points out what is true with respect to almost all of this prior art, to-wit, that the hooks or devices can be engaged with the curtain fabric without any sewing, *and this idea was definitely and conclusively not new with McGhee.*

Now this Ashmore patent No. 1,069,999 is referred to in the depositions taken in the case, commencing with the deposition of Mr. Vroom [Tr. p. 27], he being sales manager of the H. L. Judd Company, manufacturers of the device complained of in this suit, and with that concern since the year 1888 [Tr. p. 28]. That the Judd Company is to pay for defending the present suit is admitted by Mr. Vroom [Tr. p. 31], he stating that he is acquainted with the defendant. The defendant bought its hooks complained of in this suit from the said Judd Company, a corporation domiciled in New York [Tr. p. 26]. Instead of suing the manufacturer, the present defendant, doing business in California, was sued as a dealer handling the product made by the Judd Company. Counsel for appellee were retained by the H. L. Judd Company.

Beginning at transcript page 30, Mr. Vroom discusses the hook of this Ashmore patent No. 1,069,999, stating that the Judd Company began making the hooks like Defendant's Exhibit E, the Ashmore hook, shortly after the issuance of the Ashmore patent, and that they were on the market before 1918 and sales were made before 1916 and that the Judd Company manufactured hooks like Exhibit E for more than eight years and offered

them for sale all over the United States and illustrated them in catalogues sent to all parts of the United States, and that numerous sales were made in this country. These hooks were sold under a license from Mrs. Ashmore, and this license between Edith Ashmore and the Judd Company, dated January 14, 1914, is in evidence as Defendant's Exhibit G, Ashmore Royalty Contract, and was signed for the Judd Company by John Day, president.

So a drapery suspension pin or hook *not to be sewed on, but to be passed into the curtain and hold it in a loop at the lower end of a pointed pin, with a loop for suspension,* was sold extensively in this country many years before McGhee applied for the patent in suit and by the very manufacturers of the device now complained of.

We now come to a consideration of certain foreign catalogues as publications, to-wit, catalogues published many years before the end of the last century in Great Britain, by James Whitefield & Sons of Birmingham, England, and Tonks, Ltd., likewise of Birmingham, England, and also by one George Whitehouse of Birmingham, England. Page 62 of the Tonks catalogue appears opposite transcript page 133 and page 5 of the Whitehouse catalogue appears opposite transcript page 134. Copyright records of the British Assistant Keeper of the Public Records, with respect to the Tonks catalogue, and the consular certificate with respect to the signature of such Assistant Keeper, appear at transcript pages 133 and 134. The Tonks catalogue is in evidence as Defendant's Exhibit A [Tr. p. 21] and the Whitefield catalogue is in evidence as Defendant's Exhibit C [Tr. p. 24], and the Whitehouse catalogue is in evidence as Defendant's Ex-

hibit B [Tr. p. 23]. Testimony regarding these catalogues appears beginning at transcript page 19, from witness John Day, who says he went over to Birmingham, England, in 1883 and purchased merchandise from the Tonks Company and during the course of business received the catalogue, Exhibit A, and that it has been in the possession of the Judd Company for more than ten years. So that the catalogue was not only published in Great Britain and of course distributed as catalogues are, but it was referred to and used in this country, that is, the specific catalogue Exhibit A [Tr. pp. 20, 21]. In 1881, Mr. Day says, he went to England and purchased merchandise from George Whitehouse, who published the Exhibit B catalogue, and that Judd Company purchased a great many goods from that firm for many years. He says that Exhibit B contains a letter written by Whitehouse soliciting business and quoting prices on goods illustrated in the catalogue, and he saw the book when it came to the Judd Company, which was in 1882. The book has, therefore, been in possession of the Judd Company a great many years and 'way back into the last century. With respect to the Whitefield catalogue, Exhibit C, he says the book has been under his personal observation for over twenty years. Exhibits A and C and also the Whitehouse catalogue, Exhibit B, of 1882, were used by the Judd Company to select merchandise which they wished to order from the proprietors. He refers to the order book, Exhibit D, and to orders from Whitefield and Tonks and Whitehouse. Mr. Vroom [Tr. p. 27] corroborated Mr. Day, and stated that in 1911, over ten years before McGhee applied for the patent in suit, the keys to a private closet were turned over to him and in

it were the books, Exhibits A, B, C and D, and that they reposed there until two or three years before he testified. He says [Tr. p. 29] that the order book, Exhibit D, contains a copy of foreign purchases by the Judd Company with references to purchases from Tonks and Whitehouse and Whitefield; and, while he states that he did not find anything in the catalogues that gave *him* the inspiration to manufacture a drapery hook like Defendant's Exhibit 100, he had nothing to do with the manufacture of the hooks charged to be infringements. Mr. Edsall was in charge of the manufacturing end [Tr. p. 33]. It does not make any difference anyway, because there was no invention in the device whatsoever of McGhee or anyone.

Testimony begins at transcript page 45 with respect to the publication of the Whitefield, Whitehouse and Tonks catalogues. Wright says [Tr. pp. 47, 48] that the Tonks catalogue (Exhibit A), referring particularly to page 62 thereof, was issued in 1895 and circulated in 1895 and for some years thereafter. Whitehouse testified [Tr. pp. 45, 46] that Exhibit B, Whitehouse catalogue, particularly page 5 thereof, was a catalogue of general issue to customers, contained illustrations of the goods sold by George Whitehouse, and that the book was printed prior to 1892 and was widely distributed by George Whitehouse & Co. to practically all customers of the firm prior to 1920.

Obviously, this testimony of Wright and Whitehouse to show distribution of these catalogues, Exhibits A and B, clearly establishes their publication and distribution in Great Britain and wherever their customers resided. When

the evidence of these witnesses was received in the court notice was filed with the clerk of the court. The foreign testimony was objected to but without avail, the court stating in his opinion [Tr. p. 13] that "certain objections having been made to the introduction of trade catalogues and pages therefrom, the court having first considered such objections in connection with depositions taken in England, which are ordered filed, and said objections are overruled with an exception to plaintiffs, * * *." The catalogues were thoroughly proven as to their original publication and distribution; and if Your Honors will refer to the central field of page 62 of the Tonks catalogue, opposite transcript page 133, in all substance the identical McGhee patent drapery hook (No. 200) will be found there, as well as in the two cuts in the lower right-hand corner of the Whitehouse catalogue, page 5, opposite transcript page 134 (690 and 691).

All such being the case, it remains practically unnecessary to consider in any detail the question of

No Infringement.

It will be found, if minute attention be given to defendant's alleged infringing hook, that there are slight differences between the specific terms of the claim, based upon the specification, and the structure of defendant's hook. The claim must be strictly construed, particularly because of the language of the specification [Tr. pp. 84 and 85]. It is required that the point be projected slightly beyond the junction of the shank and arch, with pointed arm against the shank, so that too much drapery will not be pierced. Plaintiff has not made its hook this way, and defendant does not. The patent may, therefore, be

said to be a paper patent under *Henry v. Los Angeles,* 255 F. R. 769 (C. C. A., 9th Cir.) The exact thing called for by the claim, based upon the specification, is used by neither plaintiffs nor defendant. But there is no profit to be derived in speculating about these little differences in wire bending, *because the whole substance of the McGhee patented device and also of defendant's device is so clearly found within the archives of the prior art and particularly in the Tonks and Whitehouse catalogue devices.* If anybody could spell invention over the Whitehouse catalogue, for instance, cuts 690 and 691, to support patentability of the device described and pictured and claimed in the McGhee patent in suit, he would be an excellent friend, if an examining official in the Patent Office, for all unoriginal persons desiring to obtain patents with the element of novelty and invention absent from the subjects of the applications. The Patent Office officials often err, but they never take such an unsustainable attitude as that.

The abortive and feeble attempt to make it appear that McGhee had invented something because of the non-sew-on idea of drapery hooks is taken from under the very feet of plaintiffs by the prior art, and more particularly by the earlier non-sew-on drapery hook patent of McGhee himself [opposite Tr. p. 63a].

Before the lower court the issues were confined in the main to the question of non-invention.

Certainly catalogues, such as the Tonks and Whitehouse, are prior publications, and in support thereof we have the high authority of the Circuit Court of Appeals of the Sixth Circuit in a patent suit under a design patent,

The commercial success of any device cannot import patentability where that is not present. Judge James was entirely correct in holding the patent void for want of invention, and likewise, we submit, it might have been found anticipated.

Upon the argument we will hand up to Your Honors prints showing the hooks of the patent in suit and of plaintiffs and defendant, and certain prior art devices, such prints being taken from drawings which were handed up to the trial court for convenience in considering the issues.

With respect to the matter of non-invention, we will cite here certain further authorities for the convenient reference of the court.

Walker on Patents, 4th Ed., section 25, page 20, states as follows:

> "Sec. 25. It is not invention to produce a process, machine, manufacture, composition of matter or design which any skillful mechanic, electrician, chemist or other expert would produce whenever required."

Walker then quotes *verbatim* from *Atlantic Works v. Brady,* 107 U. S. 199, opinion by Mr. Justice Bradley. Part of that quotation we requote as follows:

> "It is never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax

upon the industry of the country without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accountings for profits made in good faith."

Your Honors, in considering a simple alleged invention for a piece of cardboard with flaps to be inserted in fruit boxes for protective purposes, in the case of *California Fruit Exchange v. Blake, Moffett & Towne*, 1928 (not found reported), found there was no invention.

In *Glen Rock Co. v. American Caramel Co.*, 209 F. R. 619, the Circuit Court of Appeals for the Third Circuit, by Circuit Judge Buffington, said, at page 620:

> "Giving due regard to all that may be said of Lafean's device, it is clear to us that it is such an economic and mechanical step as naturally followed in the evolution of an industry, and not such an original, innovating disclosure as makes an inventive act differ from mere mechanical advance."

The Circuit Court of Appeals for the Second Circuit, in *Allen Auto Specialty Co. v. Baker*, 229 F. R. 424, speaking by Circuit Judge Coxe, said as follows, at page 425:

> "The moment the advisability of keeping the rubber tires free from rain was apparent, it would, we think, have occurred to the ordinary mechanic to cover the sections so that the water would pass beyond the inner folds and not be delivered to the inside of the case. It is difficult to imagine a mechanic of ordinary intelligence who would leave the passage open when the obvious and natural thing to do is to cover it."

It certainly would be obvious to any person desiring to twist a piece of wire into shape to hang it over a curtain

rod and to impale the curtain and suspend it, to make a loop for the rod and a loop to suspend the curtain.

Your Honors, by Judge Morrow, in *Willamette Iron & Steel Works v. Columbia Engineering Works,* 252 F. R. 594, in a case involving a simple improved pulley with a flaring sheave, said, at page 596:

> "But, passing by the question of anticipation as presented by these two patents, is there invention in giving a flare to the sides of the opening in the block over the sheave or wheel? It was probably found in practice that with perpendicular sides to this opening a hook or other attachment on the line passing over the sheave or wheel would catch on the one or the other of the sides of the block. If so, what was more simple than to enlarge the opening and give the sides a flare, so that the hook or other attachment would not catch on either side, but would pass freely through the opening in the block on over the wheel? For this change in the construction of the block mechanical skill was clearly sufficient.
>
> The claim is made by the appellee that the object of the flaring sides to the opening of the block in suit was to permit the use of a narrow sheave to save weight and cost, and that the advantage of a wide sheave, as shown in one form of appellant's block, had been attained by such flaring construction of the appellee's block with a narrow sheave. This claim is made primarily to point out the difference in two blocks manufactured by the appellant, one with a narrow sheave, claimed as an infringement of the appellee's patent, and the other with the broad sheave, not claimed as an infringement. Conceding that there is this difference in the two blocks, it does not follow that this feature of appellee's block is the product of invention.
>
> Here, again, we think the difference in construction is one merely of degree, and not of invention. It is true that the issuance of a patent is of itself presumptive evidence both of invention and patent-

> ability; but we think an inspection of the device, as shown by the model and described in the specifications and claims, overcomes this presumption, and, aside from the evidence of anticipation in the Louden and Eby patents, determines that the patent in suit lacks invention."

The Circuit Court of Appeals for the Sixth Circuit, in *Berger Mfg. Co. v. Trussed Concrete Steel Co.*, 257 F. R. 741, considering a patent for studding and metal lath combination, held such patent invalid as involving elements developed in the prior art. That court, *per curiam*, said, at page 741:

> "It must be conceded that the complete combination specified in the claim is not precisely anticipated, that it possessed commercial utility, that it has gone into considerable use, and—more important than all—that metallic studs or supports and metal lath had been used in combination for a number of years and fastened together in different ways without adoption by any one of the specific methods of fastening here disclosed. These considerations make strongly in favor of patentability; but we are compelled to think that they are not sufficient to overcome the conclusions necessarily resulting from the state of the art."

It will be noted in this case that the court did not find the claim to be "precisely anticipated," but still found that the lower court was right in dismissing the bill. The claim quoted in the opinion has to do with prongs and bends, as does the patent at bar.

The District Court for the Western District of New York, by Judge Hazel, in *Adt v. E. Kirstein Sons Co.*, 259 F. R. 277, ordered a decree for defendant with respect to several patents relating to eyeglass mountings. The court said, with respect to one patent, at page 280:

"In departing from the combination by adapting additional elements or arranging old elements differently for confining the guard arm or for carrying the inner spiral spring away from the center of the coil outwardly, the patentee made changes or modifications which do not appear to have secured any new advantages or results."

The court found that the patents had to do with things which failed in "describing anything patentably different from that described in prior patents to which attention is herein directed, excepting perhaps claim 5 of patent No. 1,040,096, which, however, is not infringed by defendant's mountings."

The Circuit Court of Appeals for the Second Circuit, in *Boston Pencil Pointer Co. v. Automatic Pencil Sharpener Co.*, 276 F. R. 910, had before it an appeal by defendant from a decree for plaintiff concerning a patent for a chip receptacle for pencil pointers. The decree was reversed, with directions to dismiss the bill. The court said, at page 911:

"Nevertheless commercial success is an unsafe guide to invention unless prior efforts to fill the space be shown (National etc. Co. v. Bissell etc. Co., 249 Fed. 196, 161 C. C. A. 232); and when they are shown, it is not infrequently found that the faculty of invention was not necessary to fill whatever vacancy existed.

Further, it is settled that articles may be new in a commercial sense, when they are not new in the sense of the patent law (Collar Co. v. Van Deusen, 23 Wall. 530, 23 L. Ed. 128), and novelty, however great, can never be put in the place of invention (Robins v. Link Belt, 233 Fed. 1005, 148 C. C. A. 15). The fact that a patented device has had enormous sales does not dispense with all other evidence of invention. In patents of the kind before us, the

test inquiry is always, 'What will it do?' and the answer to that question in the present instance is shortly, 'It permits one to see inside.' It does nothing else, and in the claims in suit pretends to no other merit or mark of distinction."

Also, further on, at page 912:

"The commercial embodiment of this idea, when affixed to a sharpener not covered by this patent, and all sold at a cheap rate, seems neat, clean, durable, and effective; but we hold it obvious that the only part of that combination or aggregation of merits which is before us (the transparent body) does not constitute patentable invention because it did not require the inventive faculty to enlarge a window until it constituted the body of the holder."

The District Court for the Western District of New York, again by Judge Hazel, in *Cordley v. Richardson Corporation,* 278 F. R. 683, dealing with a patent for improvements in coolers for water and other potable liquids, which it held invalid, said, at page 685:

"Although plaintiff's device has come into popular favor, there must be both utility and invention to sustain a patent. Great utility not infrequently results from mechanical changes and alterations which do not embrace invention. That rule is not inapplicable in this case, inasmuch as I think there was no patentable novelty in either forming the two parts of the reservoir integrally, or making it of one piece of glass, or making it tight and rigid; for such alterations and modifications, by which better cooling and display were obtained, are thought to fall within the realm of mechanical skill, and not invention. Old devices frequently require alteration or modification to apply them to uses for which they were not originally designed or adapted, and when the court is satisfied that the changes require only the exercise of the skilled mechanic, the presumption of patentability running with the allowance of the patent is overcome."

In *Clark Mfg. Co. v. Tablet & Ticket Co.,* 18 F. (2d Series) 91, a decision by the Circuit Court of Appeals for the Seventh Circuit, opinion by Circuit Judge Evans, the court affirmed a decree for defendant under a charge of infringement of a patent for changeable signboard which was held void for want of patentable novelty, and the decision turned upon the prior art, which the court said "restricted Clark in his invention, if it did not fully anticipate him" (page 92).

In *Gerosa et al. v. Apco Mfg. Co.,* 299 F. R. 19, a decision of the Circuit Court of Appeals, for the First Circuit, District Judge Hale affirmed the decree of the lower court for defendant. The bill charged infringement of a patent for a lug for power plant support for motor vehicles, in addition to infringement of alleged trademark. Said the court, at page 24:

> "The law is well understood that, in order to be an invention, an improvement must be the work of the inventive and creative faculty, and not merely the exercise of reason and experience, or the act of a mechanic skilled in the art. Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438; Thompson v. Boisselier, 114 U. S. 1, 12, 5 Sup. Ct. 1042, 29 L. Ed. 76. In Butler v. Bainbridge (C. C.), 29 Fed. 142, Judge Coxe has pointed out the perplexities which surround questions of patentable invention, and that such questions cannot always be solved by examination of adjudged cases. Such cases, he says, 'serve to illuminate the paths to be traversed, but he who desires to select the right one must depend largely upon his own judgment.' Without doubt it is the duty of a court to recognize the inventor when it meets him; but it is also its duty not to extend such recognition to mere mechanical skill. It is as important to afford protection to manufacturers and mechanics in their right to employ old

> devices for new situations as it is to safeguard inventors in their discoveries. Dr. Eliot, a philosopher as well as educator, teaches that fundamental trades, such as those of the carpenter, the mason, and the blacksmith, have provided valuable education for the human race, and that it is the duty of modern science to encourage those who engage in fundamental mechanics to acquire more skill in manual training and in sense-training, in order to produce results far beyond those that are now produced. Clearly it is an injustice to discourage such mechanics by granting a monopoly to patentees for doing what skilled blacksmiths have been doing for years.
>
> We think that to grant a monopoly upon the bracket claimed to be covered by the Gerosa patent would be to prohibit automobile mechanics from continuing to do what they have done for a long time. We think no discovery or novel idea has been developed by the Gerosa patent, and that the patent must be pronounced invalid for lack of patentable invention."

And the cases along these lines are legion. Mere mechanical skill (and it is not even questionable whether that is presented in this case over the prior art) cannot be recognized as rising to the dignity of the factor of invention required by the statute. To so recognize trivial workshop or preferred practice is to put a premium upon the efforts of the speculative schemers who as a class have been condemned in the opinion of the Supreme Court in *Atlantic Works v. Brady, supra.*

We were compelled to write this brief prior to receiving the brief of appellants, and wish to make now specific rejoinder to portions of said brief where same may warrant attention.

SPECIFIC REJOINDER TO APPELLANTS' BRIEF.

On taking up appellants' brief we are impressed with a fatal insufficiency, error, viewpoint and angle of approach therein, which renders the brief as a whole out of point and inapposite to the narrow issues presented by this case. In sizing up this error in appellants' position, which we say constitutes essential trouble with their whole brief, we have only to point out that the thing of the patent in suit *is not such a structure or combination as to be capable of expressing any inventive concept, without which latter there can be no patentability.* Appellants try to apply principles and theories of law which do not fit, any more than the clothing for the articulated frame of the human being would fit the limbless form of a serpent. The group of cases cited, having to do with papermaking machines, doughnut machines, marine dredges, printing presses and the like, do not fit at all the physical subject-matter of the patent having to do with an S-shaped piece of wire. Complicated and articulated structures and combinations of elements constitute a field for the application of many interesting doctrines pertaining to invention and novelty. But these doctrines cannot be applied to such a physical issue as that before the court. We do not deny that wire can be fabricated into structures involving invention. Invention might enter into wire fence structures and wire cages and traps and the like where there is some combination and interrelation of elements resulting in a manufacture or device having mechanical performance of one kind or another, the wire serving merely as attentuated structural features. But here we have nothing new even from the consideration

of shape, nothing new from consideration of function or office, nothing new from consideration of results and nothing which is mechanical in its expression of function, that is, nothing which is kinetic. The action is merely static, just like that of the old pot hook suspending kettles. And, in addition, the prior art discloses the whole teaching of the patent in suit, so that even hair-splitting fails to support any issue of invention.

Therefore, we say that none of the law cited by appellants applies and the whole appeal thus trips and falls at the threshhold.

The extended indulgence in words over this bent piece of wire that added nothing to the knowledge and assets of mankind fails to appeal to reason or justice for the above and other obvious reasons.

It is also pointed out that the brief in no manner conforms to the rules of this court as to form and arrangement.

Detail comment is perhaps in order as follows:

We know of no rule requiring the proving of want of invention beyond a reasonable doubt. As to want of novelty, that must be proven beyond a reasonable doubt, as anticipation. But it is for the court to consider, in the light of all the evidence, whether or not the presumption of presence of the quality of invention is overthrown. This does not even require the adducing of any proofs, as the court may declare a patent void for want of invention upon motion to dismiss or demurrer, as this court, in affirming the late Judge Wellborn, did in the *Towne Steering Wheel* patent case, *supra*. The position taken by appellants on page 4 is thus in error. Also by their

statement, infringement is admitted. It is not. If there be any difference between the prior art and the McGhee device, there is as much difference between defendant's device and the McGhee patented device, and by that token there could be no infringement were the patent valid.

In view of the observations and contentions just made, we deem it unnecessary to discuss the inappositeness of the authorities cited, for such will appear upon reading same. As examples, however, we may refer to the *Krauth v. Autographic Register Co.* case cited on page 6 and which considered a "combination"; and the case on the next page, *Sodemann Heat & Power Co. v. Kauffman,* which also refers to a new "combination." There is no "combination" in the McGhee patented device—no aggroupment or association of elements. It falls in the same class as tools and fasteners and other things which have no law of operation and no co-ordination of parts and features and which expresses any mode of operation or functional activity. It falls within the same class as the device in *Hookless Fastener Co. v. H. L. Rogers Co., Inc.* (C. C. A., 2d Cir), 28 F. (2d) 814, where the alleged invention was a fastener for slit and other closures, consisting of interlocking members sewn on tape and to be applied on each side of an opening, and caused to interlock by a slider moved from one end to another; in that case there was even a movable part, and the alleged invention was in making this movable slider separable so that it could be separated and the slit opened by a tearing motion from the open end, or could be moved in its reverse direction to open the slit. The court rules that there is no invention in application of such an old closing device to a slit closed at both ends, "since this was but an ex-

pected and intended use of the prior art slide fasteners." (This comment is taken from the current number of the Journal of the Patent Office Society, page 190.) The patent was held to be void. Since there is no reorganization or no new teaching in the McGhee patent, or new structure or use, there could be no invention.

A recent case in this circuit, *Alliance Securities Co. v. J. A. Mohr & Son,* 14 F. (2d) 793, is quoted from, at page 796, on page 9 of appellants' brief. The decree was affirmed by this court in 14 F. (2d) 799. The patent had to do with means for distributing liquids, spraying, etc., and it discussed the search of experts in spite of which the invention escaped in the realm of mechanical elements. What has such a case as that got to do with the subject-matter we are concerned with here? No expert would bother with old S-hooks.

On page 10 appellants start a discussion of what they deem misappropriation of plaintiffs' business. The fact is there was no underlying invention to purloin. What the H. L. Judd Company did was merely to go into open competition, and in doing so they did not even exactly duplicate the McGhee hook, as will be seen by comparison. Mr. Edsall testified, as on page 14 of appellants' brief, that the Judd Company didn't have their patent attorney make any search for any patent to McGhee. Why should they assume it was even patentable? At any rate, whether McGhee was going to apply for patent for the present hook would not normally arouse any apprehension in a manufacturer. The truth of this is demonstrated by the decree of the lower court. Mr. Edsall frankly wrote plaintiffs regarding any such patent [Tr. p. 137], but the letter was returned unclaimed [Tr. p. 138]. So, as he

states [Tr. p. 33], he did not know of the patent in suit when the Judd Company commenced manufacture of the hooks complained of.

Appellants have considerable to say about recognition by the trade and the like, proving, as they contend, novelty and utility of the McGhee drapery hook. This crops out particularly on page 12. The fact is and the law is that one cannot transform mere mechanical skill or non-invention into invention.

In *Tubelt Co. v. Friedman et al.,* a decision by the Circuit Court for the District of New York, 158 F. 430, decree for defendant, in a suit involving an apparel belt, having to do with thread stitching, etc., the court said, pages 436-437:

> "The patentee, Gaisman, in claim 6 has reproduced the belts of the prior art, substituting for the over and over stitch this old loop stitch, a well-known equivalent, except that the loop stitch, it is alleged, makes the flat seam a little firmer and flatter, and keeps the edges in better alinement, so that as the belt bends the edges are less liable to show. The effect of the stitches is one of degree only. The one, at best, is superior to the other only in that it is a little more effective. Such a substitution is not patentable invention. Smith v. Nichols, 21 Wall. 112, 118, 119, 22 L. Ed. 566, quoted and approved in Burt v. Evory, 133 U. S. 349, 358, 10 Sup. Ct. 394, 33 L. Ed. 647; Sloan Filter Company v. Portland Gold Mining Co., 139 Fed. 23, 71 C. C. A. 460; Crouch v. Roemer, 103 U. S. 797, 26 L. Ed. 426.
>
> In Smith v. Nichols, *supra,* the Supreme Court expressly decided:
>
> 'A mere carrying forward, a new or more extended application of the original thought, a change only in form, proportions or degree, the substitution of

equivalents doing substantially the same thing in the same way, by substantially the same means, with better results, is not such invention as will sustain a patent.'

Here all we have is the substitution of an equivalent, the old and well-known loop or zigzag stitch, for the over and over stitch of many patents in this art, with better results, it is claimed, only. This, says the Supreme Court of the United States, is not invention. Merely transferring an old element to a new sphere of action, when it performs its old function in the same old way to produce the same old result, is not invention; but, if it be so transferred to meet a novel exigency and serve a new purpose, it may be. Du Bois v. Kirk, 158 U. S. 58, 15 Sup. Ct. 729, 39 L. Ed. 895. In Western Electric Company v. La Rue, 139 U. S. 601, 606, 11 Sup. Ct. 670, 672, 35 L. Ed. 294, the court held:

'While the promotion of an old device, such, for instance, as a tonsorial spring, to a new sphere of action, in which it performs a new function, involves invention, the transfer or adaptation of the same device to a similar sphere of action where it performs substantially the same function does not involve invention.'

In the case now before this court the patentee has made a belt, old in the art, by the use of the same processes and modes of construction and materials as were used in and well known to and described in the prior art; but he has substituted for the old and well-known over and over stitch, one of the things to be used in one of the several steps to be taken, the old and well-known loop or zigzag stitch, the one being the well-known equivalent of the other, doing the same work in the same way and accomplishing the same precise result, except that this result by such sewings in this belt is somewhat the better for the substitution. This sewing is an independent process in the construction of the belt, and is no wise affected or modified by, nor does it in any wise affect or modify, the other steps

in the construction or manufacture of the belt or other similar article. This substitution does not constitute or involve invention. Here we have no new or novel exigency. Here we have no new purpose to be served. The object of the sewing, the purpose to be served, is precisely the same as in the prior art, viz., 'such stitches as will allow the resulting tubular body to be flattened, so that the edges, 3a, 3b, will abut or meet,' and 'such a stitch while joining the lapped edges of the material, as shown in Fig. 4, enables said material to be flattened out in two parallel walls or webs, 3c, 3d, while the edges, 3a, 3b, can abut or meet and lie in substantially the same plane.' This is what the patent in suit says."

We quote this somewhat at length for the convenience of the court and to point our contention that even if substitutions and changes had been made by McGhee they would not under the circumstances have amounted to invention, as there was no new purpose to be served and no new or novel exigency. Also the court said along the same line, in this case in which the patent in suit failed to show patentable invention and was held void, page 439, *et seq.*:

"It will not do to find patentable invention in a device or structure where all its elements are found in the prior art, and all the alleged inventor does to produce it is to take one of the prior patented devices, and leave out one of its elements and substitute in place thereof a well-known equivalent taken from another device of the same kind, where it was used for the same purpose, operated in the same way, and produced the same results as is required in its new location, and the sole result of the substitution is that the substituted element operates or works a little better than did the displaced one, and thereby the operation of the alleged new structure is somewhat improved. This is improvement, but not invention.

It may be a successful experiment, but there is no novelty. 'While a combination of old elements producing a new and useful result may be patentable, if the combination is merely the assembling of old elements producing no new and useful result invention is not shown.' Computing Scale Co. of A. v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645. To constitute improvements in invention they must be the product of original conceptions. Pearce v. Mulford, 102 U. S. 112, 118, 26 L. Ed. 93; Slawson v. Grand Street Railway, 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576; Munson v. N. Y. City, 124 U. S. 606, 8 Sup. Ct. 622, 31 L. Ed. 586.

Here complainant contends that its belt as a whole, a completed thing, is made better, more durable, more attractive, more salable by reason of the substitution; but conceding all this to be true, patentable novelty is not shown. The better result does not show invention. Smith v. Nichols and Western Electric Co. v. La Rue, *supra*. Its greater utility, durability, attractiveness and marketability do not of themselves show patentable novelty. These facts are evidence on the subject, and in very doubtful cases may be persuasive and turn the scale in favor of the patentability of the device. A valid patent must combine utility, novelty, and invention. Neither large sales nor popularity or effectiveness of itself shows patentable invention. Nor do all these combined establish it. See Duer v. Corbin Co., 149 U. S. 216, 223, 13 Sup. Ct. 850, 37 L. Ed. 707; Richards v. Elevator Co., 159 U. S. 477, 487, 16 Sup. Ct. 53, 40 L. Ed. 225; American Sales Book Co. v. Bullivant, 117 Fed. 255, 54 C. C. A. 287; McClain v. Ortmayer, 141 U. S. 419, 429, 12 Sup. Ct. 76, 35 L. Ed. 800; Union Biscuit Co. v. Peters, 125 Fed. 601, 609, 60 C. C. A. 337; Falk Mfg. Co. v. Missouri R. Co., 103 Fed. 295, 43 C. C. A. 240; New Departure Bell Co. v. Bevin Bros. Mfg. Co., 73 Fed. 469, 19 C. C. A. 534; Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co., 150 Fed. 738, 80 C. C. A. 404. In New Departure Bell Co. v. Bevin Bros. Mfg. Co., *supra,* Judge Lacombe said:

'But this precise mechanism was described and published to the world in the Bennett patent, and is used in complainant's bell with no other reorganization of operative parts than the insertion of an additional gear and pinion wheel, and such a shifting of the spring as introduces no new function. In our opinion such unsubstantial changes do not involve invention.'

In Dodge Coal Storage Co. v. N. Y. C. & H. R. R. Co., *supra,* Judge Townsend said:

'The would-be inventor or designer of novel mechanism for accomplishing these objects, therefore, is presumed to have before him the whole field of the art of the engineering construction applicable to the collection and removal, the elevation, and conveyance of such materials from one point to another. And the question here presented is, not what these particular patentees may actually have invented, but whether the state of the art in such engineering field was such that it would require invention to construct such apparatus, or to adapt the constructions known in the art to the exigencies of a particular situation, or the requirements of a certain class of materials. * * * We conclude, therefore, that the patentees did not devise any novel means by which to carry out their ideas and put them in shape for practical operation.'

In McClain v. Ortmayer, *supra,* the court said:

'This court has held in a number of cases * * * that in a doubtful case the fact that a patented article had gone into general use is evidence of its utility. It is not conclusive even of that—much less of its patentable novelty.'

Scores of pertinent quotations might be made, but it is not necessary. The complainant's belt is exceedingly attractive and neat. Evidently, so far as the evidence discloses, it is of great utility and the best on the market, but these facts do not prove patentable invention.

> In view of the prior art and prior well-known uses, the complainant's patent fails to show patentable invention and is void.
>
> There will be a decree for the defendant dismissing the bill, with costs."

As was said in *American Ldy. Mch. Mfg. Co. v. Adams Ldy. Mch. Co.,* 161 F. 556, 563:

> "To hold that a combination of old and well-known elements in the old way with some modifications to which the skill of the ordinary mechanic skilled in the art is adequate, unless to meet a new and novel exigency, is patentable for the reason the benefit to mankind is valuable and extensive, is to reward every mechanic for exercising his skill, not his mental conceptions, by a monopoly, and a misconception and works a perversion of the patent laws."

It was said in *Archer et al. v. Imperial Mach. Co.,* 202 F. 962, that doing substantially the same thing in the same way by substantially the same means, but with better results, is not such invention as will sustain a patent.

In *Harvey Hubbell Inc. v. Fitzgerald Mfg. Co.,* 283 F. 790, the Hubbell patent for a separable attachment plug for electrical connections was held void for lack of invention, although a useful thing and capable of production economically and at reduced cost and likewise commercially successful.

In *Columbia Metal Box Co. v. Halper,* 220 F. R. 912, a decision of the Circuit Court of Appeals for the Second Circuit, involving a patent for a sheet metal junction box for use in electric wiring, such patent was held void for want of invention, and the court said, page 914, *et seq.:*

"In Magowan v. New York Belting Co., 141 U. S. 332, 343, 12 Sup. Ct. 71, 35 L. Ed. 781 (1891), the fact was remarked, and evidently had much weight, that the patented product went at once into such an extensive public use, as almost to supersede products made for a like purpose under other methods. That fact was regarded as pregnant evidence of its novelty, value, and usefulness. And this success was attained, although the new product was put upon the market at a price from 15 to 20 per cent higher than the older products, notwithstanding it cost 10 per cent less to produce it.

The question which the trial court considered was whether the adaptation of a form of hinged cover not wholly unknown to the peculiar requirements of the new art of electric wiring constituted invention. At the first hearing the court stated that it did not appear that the form of hinging shown by the patented device had ever before been used for the purpose sought by the inventor. And it concluded that the method of hinging used produced a tight cover without the use of the strap or butt hinges. While thinking this a small thing, the court declared it useful and desirable, a novel and meritorious device, and sustained the patent. On rehearing, after the introduction in evidence of the General Electric cast metal box, the trial court reached the conclusion that the very form of cover which the patentee of the patent in suit claimed as new had been used for electric wiring purposes before the earliest invention date claimed by complainant."

So, in the case at bar, every aspect of the simple thing of the patent, and the very form thereof, was old in the art prior to McGhee's date of alleged invention.

In *Gilchrist v. F. B. Mallory Co.,* decision of the District Court, District of Oregon, 281 F. 350, District Judge Bean said, where there was even an apparently new element introduced (p. 351, *et seq.*):

"All other elements of the claims in question are old in the art, and in the Gilchrist pulley they do not perform any new function or have any new mode of operation, or produce any new result, and therefore the combination of them in one device is not invention.

'The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union: if not so, it is only an aggregation of separate elements.' Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719.

See, also, Hailes v. Van Wormer, 20 Wall. 353, 22 L. Ed. 241; Palmer v. Corning, 156 U. S. 342, 15 Sup. Ct. 381, 39 L. Ed. 445; Thatcher Heating Co. v. Burtis, 121 U. S. 286, 7 Sup. Ct. 1034, 20 L. Ed. 942; Jackson Skirt & N. Co. v. Rosenbaum, 225 Fed. 531, 140 C. C. A. 515.

Oil reservoirs in pulley sides are old in the art, as shown by the Morgan, Ludford and Labadie patents. Indeed, the Morgan patent reads substantially letter perfect with claim 1 of complainant's patent. It is true the oil reservoir in the Morgan pulley is formed by a plate riveted on the side and not cast as an integral part of it, as in complainant's device. It, however, is for the same purpose, operates and functions in the same way, and produces the same result by retaining oil and lubricating the bearing pin as in complainant's patent, and it was not invention for complainant to make the side in one piece, thus combining the separate parts of the Morgan patent, since there is no substantial change in function, operation or result. Ft. Pitt Supply Co. v. Ireland & Matthews Mfg. Co., 232 Fed. 871, 147 C. C. A. 65; Enterprise Mfg. Co. v. Shakespeare Co., 220 Fed. 304, 136 C. C. A. 138; Crier v. Innes (C. C.) 160 Fed. 102; Huebner-Toledo Breweries v. Mathews Grav. Car Co., 253 Fed. 433, 165 C. C. A. 177; Machine Co. v. Murphy, 97 U. S. 120, 24 L. Ed. 935; R. R. Supply Co. v. Elyria I. & S., 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136.

In reaching this conclusion, I am not unmindful of the presumption of the validity of the patent arising from its issue, or that the auto-lubricating block manufactured by plaintiff has proven its superior utility in the logging business.

'But a mere carrying forward or new or more extended application of the original thought, a change only in form, proportions, or degree, the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means with better results, is not such invention as will sustain a patent.' Smith v. Nichols, 88 U. S. (21 Wall.) 119, 22 L. Ed. 566.

And 'the advantages claimed for it (the Gilchrist device), and which it no doubt possesses to a considerable degree, cannot be held to change this result, it being well settled that utility cannot control the language of the statute, which limits the benefit of the patent law to things which are new as well as useful. The fact that the patented article has gone into general use is evidence of its utility, but not conclusive of that and still less of its patentable novelty.' Grant v. Walter, 148 U. S. 556, 13 Sup. 702, 37 L. Ed. 552.

See, also, McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; Hollister v. Benedict & Burnham Mfg. Co., 143 U. S. 59, 5 Sup. Ct. 717, 28 L. Ed. 901; Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Edwards v. Dayton Mfg. Co., 257 Fed. 980, 169 C. C. A. 130; Herzog v. Keller Co., 234 Fed. 85, 148 C. C. A. 101; Huebner-Toledo Breweries v. Matthews Gravity Carrier Co., *supra*; Klein v. Seattle, 77 Fed. 220, 23 C. C. A. 114.

The question whether a patent involves invention is one of fact for the court, to be answered in the light of all the pertinent considerations, including the prior art, and, so viewing the complainant's patent, I am of the opinion that it is invalid for want of invention."

There are lots of things which fill a long-felt want which do not smack of invention. Articles which are stronger, more compact in form, better in appearance and the like, fill long-felt wants but myriads of them are produced without recognition by the Patent Office.

While the Tonks catalogue was in the possession of the Judd Company for years prior to the McGhee invention, the records show plainly that it was in the New York office and not in the Connecticut factory which was in charge of Mr. Edsall. [Tr. p. 33.] Whether it was or was not, has nothing to do with the proper entry of the Judd Company into competition with appellants, and there was no reason why any article in the Tonks catalogue should be put out in this country by the Judd Company or anyone else at any particular time. Obviously these devices were made and sold abroad and the manufacture was taken up here by McGhee and then by the Judd Company, both of whom under the law are chargeable with or to be credited with notice of prior accomplishments in the art in which they were working.

At the bottom of page 14 appellants make an absolutely erroneous statement to the effect that drapery hooks before McGhee's invention had to be sewed on to the draperies. This is neither true of the Tonks or Whitehouse catalogue hooks or even of the hooks of McGhee's prior patent. Even the Ashmore patent under which the rights were possessed by the Judd Company was not a sew-on hook. McGhee could not get a second patent in any sense monopolizing this feature, after his first patent had disclosed it. As to the matter at the top of page 15, we are in agreement with appellants that the McGhee device is merely an S-shaped hook pointed at one end.

With respect to the matter on page 15, in view of the file wrapper and contents the claim of the McGhee patent is to be construed to mean and be a Chinese copy in words of the thing in the drawing of the patent. Appellants admit that this claim is a "pen picture of the drawings of the patent". There are differences between plaintiffs' commercial device and also the defendant's device. As we have said, they are perhaps further from the patented device than the prior art devices, so neither plaintiffs nor defendant are practicing the exact teaching of the McGhee patent.

As to the discussion of the various prior art patents and devices, which is indulged in in appellants' brief, we will make no attempt here to correct implications and suggestions and theories therein which we do not consider to be accurate. We beg to submit that in our discussion of these things, *supra,* we have dealt fairly and clearly and accurately with them and we think that Your Honors will clearly understand them and their pertinence in consideration of this brief.

As to the British patent to Harrison, discussed at pages 19 and 20, it is clearly deducible that the position appellants take is that McGhee omits certain things that the Harrison patent shows. Such omission does not change the mode of operation or use and no invention could result from such omission. In the discussion of the Ashmore patent, page 21, *et seq.,* clearly the Ashmore hook can swing, and it makes no difference whether it be hooked over a rod or ring as far as any invention, if present, is concerned. Also, this Ashmore hook is in the same class as the McGhee hooks of both McGhee patents, namely, it is a non-sew-on hook.

An erroneous statement is made with carelessness, on page 23, that "all of the devices pictured on the respective pages of the catalogues" are to be used in connection with curtain pole rings and could not be used as is substantially the identical thing of the McGhee patent. Self-refutation of this statement is made further on when counsel say: "These catalogues contain no description of manner of use." And we do not understand why it "would be impossible to take any one of these three devices and use them as plaintiffs' drapery hook is used". Certainly, practically identical things can be used in substantially identical manner, particularly where there is no countervailing factor to prevent it. The brief then goes on to talk about changing these hooks to render them "capable of performing the functions of plaintiffs' patented device". This is to us a most remarkable gesture and is without any foundation in structure. As the catalogue hooks are so closely like the McGhee patented hook that they could be mixed with the latter in the same box and no one would discover the difference in withdrawing and using them, somewhat definite pointing out of the substantial changes necessary to be made in them, to make them usable as the McGhee hooks are used, certainly is in order from appellants. One might as well say that a belt and buckle for a thin man could not anticipate one large enough for a stout man. Speaking again of the catalogues, the picture of a common, simple bent piece of wire with clear form—an S-hook—needs no legend to tell us what it is. It speaks for itself, particularly in view of its classification in those catalogues. It makes no difference whether the catalogue devices were ever known and used in this country. Publication in the catalogue is

sufficient under the law. The citation of authority from Your Honor's opinion in *Carson v. American Smelting & Refg. Co.*, appearing on page 26, is very inapt. The rule set down by Your Honors applies where any uncertainty exists. There could be no uncertainty here. Description of the foreign catalogue hooks would be useless and unnecessary to any grammar grade school boy. Any housekeeper wishing to hang curtains could surely cut and sharpen wire and fashion hooks therefrom like these Tonks etc. catalogue hooks, wherewith to hang her curtains. She would need no teaching from any expert or mechanic. So, with respect to these Tonks, etc. catalogue disclosures, appellants are merely urging this court to believe there is some magic in the length of a piece of bent wire, or the fullness or thinness of the loops thereof or the sharpness of the point thereon. There is none of the tang of invention in any of these aspects and characteristics. What better authority than that at the bottom of page 28 for the integrity of the prior art in this case in its elimination of the quality of invention from the bent wire of the McGhee patent? There is not a structural difference between Tonks and McGhee. They are closer together than neighboring blades of grass. These bent wire affairs are too simple in nature to be chargeable with harboring any critical or connoted "principle" or "mode of operation". There is not enough subtlety in them to intrigue a kindergarten child. Obviously the foreign catalogues went to people in trades handling these things. They fully comply with requirements of the law as to prior publication.

The authority at the top of page 31 is not in point. The Tonks *et al.* catalogues were circulated and were pub-

lic documents and no words were needed to describe the things therein shown. The catalogue classifications are enough for purposes of instruction. This ancient decision from federal cases is not today's law on such matters. The *Union Tool Co. v. Wilson & Willard Mfg. Co.* case cited at the bottom of this page dealt with a patent for an underreamer, and a cut could not show the internal working parts. There is nothing such to be concealed in a bent wire. The decree in that case was reversed on the main issues by Your Honors, as reported in 249 F. R.

However, such a catalogue is a public work, and a cut alone where no description is necessary to make its disclosure clear is sufficient of a publication in such a catalogue. This has been very recently decided by no less a patent law authority than the Hon. Learned Hand, Circuit Judge, in a decision of the Circuit Court of Appeals of the Second Circuit in *Jockmus v. Leviton, et al.*, 28 F. (2d) 812, 813, et seq., where the court said, reviewing the law, including Reeves v. Keystone Bridge Co., cited by appellants here:

> "We are content to follow the ruling in Imperial Glass Co. v. Heisey, 294 F. 267 (C. C. A. 6), that a catalogue distributed generally to a trade is a publication within Revised Statutes, Sec. 4886, 35 U. S. C. A., Sec. 31. It may indeed be that such a document was not a 'public work' under the act of 1836 (5 Stat. 117), and that Parsons v. Colgate (C. C.) 15 F. 600, was rightly decided, though the brief comment in the opinion does not take the distinction. Reeves v. Keystone Bridge Co., 20 Fed. Cas. 466, No. 11,660, only threw out a doubt, and went off on another point. While it was laid down without discussion in New Process Fermentation Co. v. Koch, (C. C.) 21 F. 580, 587, that circulars were not publications, it was unnecessary to the decision and certainly was not its chief reliance. Britton v. White Mfg. Co., (C. C.)

61 F. 93, was decided without discussion, and on the authority of the three cases, just cited, which support it only so far as we have said. The aggregate of these authorities is not so imposing as to cause us any hesitation in following the Sixth Circuit. On principle we are entirely in accord, for the purpose of the statute is apparent, and we ought to effect it so far as its language will allow. While it is true that the phrase, 'printed publication', presupposes enough currency to make the work part of the possessions of the art, it demands no more. A single copy in a library, though more permanent, is far less fitted to inform the craft than a catalogue freely circulated, however, ephemeral its existence; for the catalogue goes direct to those whose interests make them likely to observe and remember whatever it may contain that is new and useful.

Whether the cut, No. 712, in Gogarten & Schmidt's 1908 catalogue, was a sufficient disclosure is another matter. If the claims be strictly limited, it certainly was not, because it did not show how the end of the upper leg was fastened to the stud—whether as the plaintiff does it, or as the defendant, or in some other way. But, if the claims be read as they must be to cover the supposed infringement, we do not see what can be thought missing. That it was an adjustable candle socket the text itself declares; how its adjustment was to be made the cut makes plain beyond chance of mistake. The socket at the top is plainly for a bulb and the screw thread at the bottom to fit upon the pipe terminal. The jacket was represented by figures 713 and 714, and the whole of this very simple invention was before the reader at a glance. We know of no rule that figures can never of themselves be an adequate anticipation of mechanical inventions, as of course they must be of designs, and we can see no reason for importing into the statute an arbitrary distinction, unrelated to its purposes, Keene v. New Idea Spreader Co., 231 F. 701, 708 (C. C. A. 6); Huebner v. Mathews, 253 F. 435, 444 (C. C. A. 6). Words have their equivocations quite as much as figures; the question always must be what the art necessarily gathered from what appeared.

Whether the catalogue was in fact distributed generally, and when, are different questions. That it was printed in 1908 no one can reasonably doubt; it was a trade catalogue, meant to pass current for a season and to be superseded, as its successor of 1910 in this very case bears witness. To suppose that it bore an earlier date than that at which it first appeared contradicts all we know about merchandising; it might be post-dated like a motor car but never the opposite. It is of course conceivable that, though printed, it was never distributed, or that the distribution was too limited to be a 'publication.' As to the last we can scarcely undertake to set a limit. Schmidt says that perhaps 1,000 went out. Far less would have served; the 50 which was his lower limit were quite enough. To be sure the fact of any distribution at all rests upon the uncorroborated testimony of him and Scharpe, because there was further documentary corroboration of neither, though each was explicit in his recollection, and each had had first hand knowledge. This would not be enough, if the catalogue itself were not produced, bearing its own evidence of existence since 1908, but no one can seriously suppose that such a document, printed in quantity, was intended to be kept secret; its whole purpose was to be spread broadcast as far as possible. It had been printed at some expense in French for French customers, and, unless some accident happened to prevent, it would in due course have gone upon its intended errand. To prove that no accident did happen, and that it did reach its destination we have, it is true, only oral, though entirely disinterested, testimony; but it is a mistake to assume that, even under the extraordinarily severe tests applied to the proof of anticipation, every step must be buttressed by documents. That some documents are necessary, perhaps, may be the rule; but, when the documents go so far as here, the ritual, if there is any, is satisfied, and the question is merely whether any doubt remains. We think that to entertain a scruple in a case so fortified is to catch at straws."

Surely, the Tonks *et al.* catalogues are fully proper evidence.

Again we point out with respect to the matter on page 32 that the witness Vroom was in the office in New York which had nothing to do directly with the production at the factory; and although he said he got no inspiration from the catalogue himself, he was not looking for any, and as a matter of fact no one needed any to make this old S-shaped hook. This is the only testimony from defendant's witnesses which appellants vouchsafed to rely upon and it is self-explanatory for the above reasons. Where is there any testimony that all of the Judd Company people scanned these catalogues for inspiration or otherwise? Appellee merely went into competition with appellants in an open field which had been invaded by that type of patent condemned by the Supreme Court in *Atlantic Works v. Brady,* 107 U. S. 192—a field just as open as that in which the old-time clothes pin was manufactured by competing interests. It required no inventive act to give either party directions for such manufacture.

We still await any definition of the alleged *conception* of McGhee. Appellants, with the prior art and wire-bending obviousness before them, dare not, we think, to attempt such a definition. And we assert that this alone is an answer to the whole appeal in this case.

The decree of the lower court, we submit, should be affirmed, with costs for appellee.

Respectfully submitted,

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